149 U.S. 783

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

OCTOBER TERM, 1891.

No. 135.

THOMAS D. PRICE, PLAINTIFF IN ERROR,

vs.

THEODORE PANKHURST AND FREDERICK C. SCHROEDER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED JUNE 3, 1892.

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INDEX.

	Original.	Print.
Caption to transcript	1	1
Stipulation as to record to be printed	2	1
Caption to transcript from United States circuit court for the district of Colorado	2	1
Transcript from district court of Summit county, Colorado	3	2
Complaint	3	2
Summons	4	4
Petition for removal	5	4
Bond on removal	6	5
Order of removal	8	7
Clerk's certificate to transcript	9	7
Answer	9	8
Replication	12	10
Order for inspection and survey	13	11
Order: Jury empaneled and sworn, January 13, 1890	14	12
Order: Trial, January 14, 1890	15	12
Order: Trial, January 15, 1890	15	13
Order: Trial, January 16, 1890	16	13
Order: Jury disagree and discharged	16	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 15, 1893.

	Original.	Print.
Order: Jury empaneled and sworn, May 16, 1890	17	14
Order: Trial, May 17, 1890	18	15
Order: Trial, May 19, 1890	18	15
Order: Trial, May 20, 1890	19	15
Order: Trial, May 21, 1890	19	16
Order: Trial, May 21, 1890	20	16
Verdict for plaintiffs, May 23, 1890	20	16
Order: Thirty days to file bill of exceptions	21	17
Order: Motion for new trial denied	21	17
Judgment	22	18
Order: Leave to file amended answer	23	19
Amended answer	24	19
Replication to amended answer	27	22
Order on motion to retax costs	30	24
Order: New trial granted	31	25
Order for survey and inspection, October 26, 1891	32	25
Order granting defendant leave to make certain developments	33	26
Order: Jury empaneled and sworn, November 27, 1891	34	26
Order: Trial, November 28, 1891	35	27
Order: Trial, November 30, 1891	35	27
Order: Trial, December 1, 1891	36	28
Order: Trial, December 2, 1891	36	28
Order: Trial, December 3, 1891	37	29
Order: Trial, December 4, 1891	37	29
Verdict for plaintiffs, December 5, 1891	39	30
Order: Motion for new trial denied	39	30
Judgment	39	31
Bill of exceptions	41	31
Testimony for plaintiffs	41	32
Original location certificate	41	32
Amended location certificate	41	32
Second amended location certificate	42	32
J. F. Pankhurst	42	33
Frederick Schroeder	44	34
S. C. Whipple	44	35
Geo. P. Walker	45	36
Testimony for defendant	45	36
Edward D. Price	46	37
H. B. Scott	51	41
C. H. Haynor	52	42
C. B. Cramer	52	42
J. B. Conrad	53	43
F. F. Van Wagenen	53	43
E. S. Metz	53	43
Abraham Player	53	43
Edward D. Bronson	54	44
W. R. Crandall	54	44
D. W. Fall	55	45
Geo. F. Jones	55	45
J. H. Cameron *et al.*	56	46
Location certification of Ouray lode	56	46
Deeds offered conveying title to Ouray lode	58	47
Testimony for plaintiffs in rebuttal	58	48

	Original.	Print.
Rufus Snyder	59	49
W. H. Wiley	60	50
Henry H. Brown *et al.* (consolidated)	62	52
Instructions asked by defendant	63	52
Charge to the jury	64	53
Motion for new trial	69	59
Certificate of judge to bill of exceptions	71	61
Bond on writ of error	72	62
Writ of error and clerk's return	73	63
Citation and proof of service	75	64
Assignment of errors	77	66
Clerk's certificate to transcript	82	71
Appearance of counsel for plaintiff in error	83	71
Appearance of counsel for defendants in error	83	72
Argument commenced	84	72
Cause submitted	84	73
Opinion of the court	85	73
Judgment	87	75
Order: Leave to file petition for rehearing	87	75
Petition for rehearing	88	75
Order: Rehearing denied	94	79
Order staying mandate	95	79
Clerk's certificate to transcript	96	79

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the adjourned May session, 1892, of the October term, 1891, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the third Monday in September, to wit, the nineteenth day of September, A. D. 1892, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges, and Honorable Oliver P. Shiras, district judge.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the third day of June, A. D. 1892, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Colorado, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the words and figures following, to wit:

2 United States Court of Appeals for the Eighth Circuit.

Stipulation.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST and FREDERICK C. SCHRODER, Defendants in Error.

It is hereby stipulated that in the above-entitled action the following portions of the transcript of record alone shall be printed:

The complaint.
The order of removal from the State courts to the United States circuit court.
The original answer.
The replication to original answer.
The order for first trial, page 23.
The order discharging jury at first trial upon disagreement, page 27.
Order for second trial, page 28.
Verdict at second trial, page 35.
Judgment at second trial, page 36*b*.
Amended answer, page 39.
Replication to amended answer, page 46.
Order granting new trial, under statute, page 52.
Trial order, page 56.
Verdict for third trial, page 63.
Order denying motion for new trial, page 65.
Judgment, third trial, page 66.

Bill of exceptions, page 68 to page 133.
Assignment of errors.
Certificate of clerk.

PATTISON, EDSALL & HOBSON,
Att'y- for Plaintiff in Error.
SAM. W. JONES,
R. S. MORRISON,
Att'y- for Defendant- in Error.

No. —. U. S. circuit court of appeals. Thomas D. Price *vs.* Theodore Pankhurst and Frederick C. Schroder. Stipulation as to record to be printed. Filed June 3, 1892. John D. Jordan, clerk.

Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore, and on, to wit, the 9th day of October, A. D. 1889, came Messrs. Montgomery and Frost,
3 attorneys of said court and filed in said court a transcript of proceedings heretofore had in the district court of the fifth judicial district of the State of Colorado, sitting in and for the county of Summit in a certain cause in said district court lately pending, wherein Theodore Pankhurst and Fred. C. Schroder were plaintiffs and Thomas D. Price was defendant.

And the said transcript is in words and figures as follows, to wit:

In the District Court of the Fifth Judicial District, within and for said County and State.

STATE OF COLORADO, } *ss:*
County of Summit, }

THEODORE PANKHURST and FRED. C. SCHRODER, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant.

The plaintiffs complain and allege:

1. That on, to wit, the twenty-sixth day of September, 1885, and ever since hitherto they were and are, the owners of, and in actual occupation of, the "Puzzle" Lode mining claim, fifteen hundred feet in length by one hundred and fifty feet in width, situate in Minnesota mining district, county of Summit and State of Colorado, and described by metes and bounds as follows, to wit: Beginning at cor. No. 1, thence N. 65 deg. E. 746.3 feet to cor. No. 2, thence N. 65 deg. 20 min. E. 753.4 feet to cor. No. 3, whence cor. No. 50, sur. No. 86 bears N. 31 deg. 20 min. W. 42.6 feet; thence S. 25 deg. E. 150 feet to cor. No. 4, thence S. 65 deg. 20 min. W. 754 feet to cor. No. 5, thence S. 65 deg. W. 746 feet to cor. No. 6, thence N. 25 deg. W. 150 feet to place of beginning.

2. That the plaintiffs are, and at all times mentioned in this complaint have been, citizens of the United States.

3. That they claim the legal right to occupy and possess said premises and are entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, and the laws of the United States, and of the State of Colorado, by pre-emption and by actual prior possession, as a lode mining claim, located on the public mineral domain of the United States.

4. That on or about the eighth day of March, 1889, the defendant wrongfully entered upon parcel of said claim, to wit: All that part of said claim which is intersected by the exterior lines of survey lot No. 5654, know- as the "Ouray" Lode mining claim, as shown by plat marked Exhibit "B," filed on the 25th day of April, 1889, in the land office of the United States at Leadville in said State, with the adverse claim of said plaintiffs against the entry of
3½ said survey lot for patent such ground so intersected being described as follows: Beginning at the intersection of a line running from corner five to corner six of the "Puzzle" Lode mining claim with a line running from corner three to corner four of the "Ouray" Lode mining claim, whence corner No. 6 of the "Puzzle" Lode mining claim bears S. 64 deg. 55 min. W. 186.7 feet and corner No. 4 of the "Ouray" Lode mining claim bears S. 49 deg. 54 min. W. 216.1 feet, thence N. 49 deg. 54 min. E. 544.3 feet, thence N. 65 deg. 16 min. E. 466.6 feet, thence S. 49 deg. 54 min. W. 536.5 feet, thence S. 65 deg. 16 min. W. 215.1 feet, thence S. 64 deg. 55 min. W. 361.3 feet to the place of beginning, and that defendant hath ever since hitherto wrongfully withheld the possession of said parcel of said "Puzzle" Lode mining claim from the plaintiffs to their damage in the sum of one thousand dollars ($1,000.)

5. That this suit is brought in support of said adverse claim, and that plaintiffs necessarily disbursed, expended and paid out the sum of twenty-five dollars ($25.00) for plats, abstracts and copies of papers filed in said land office with his said adverse claim, and also a reasonable counsel fee, to wit, fifty dollars ($50.00) for the expense of preparing his said adverse claim.

Wherefore plaintiffs pray judgment against the defendant:

1. For the recovery of possession of said parcel of said "Puzzle" Lode mining claim.

2. For the sum of one thousand dollars ($1,000) damages.

3. For the sum of seventy-five dollars ($75.00) expended in support of said adverse claim.

4. For costs of suit.

JONES & RIDDELL,
Attorneys for Plaintiffs, Denver, Colo., Barclay Block.

Indorsed: 879. Theodore Pankhurst *et al.* pl'ffs, *vs.* Thomas D. Price, def't. Complaint. Filed May 6th, 1889. R. R. Kirk, clerk. Jones & Riddell, att'ys for pl'ffs.

4 STATE OF COLORADO, } ss:
Summit County, }

In the District Court.

THEODORE PANKHURST and FRED. C. SCHRODER, Plaintiffs, *vs.* THOMAS D. PRICE, Defendant. } Summons.

The People of the State of Colorado to Thomas D. Price, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiffs in the district court of Summit county, State of Colorado, in which said court, county, and State the complaint in the above-entitled action is filed, and to answer the complaint therein within twenty days after the service hereof, if served within the county, or, if served out of this county or by publication, within forty days after the service hereof, exclusive of the day of service, or judgment by default will be taken against you according to the prayer of the complaint in said action, a copy of which is hereto annexed.

Given under our hands, at Breckinridge, in said county, this 6th day of May, A. D. 1889.

JONES & RIDDELL,
Att'ys for Plaintiffs.

Barclay block, Denver, Colo.

(Indorsed:) No. 879. Summons. In district court, Summit county. Theodore Pankhurst and Fred. C. Schroder, pl'ffs, *vs.* Thomas D. Price, def't. State of Colorado, —— county, *ss.* Office of the sheriff of said county, ——, A. D. 188–. I hereby certify that I received the within summons on the — day of ——, 18—, at — o'clock — m. —— ——, sheriff, by —— ——. Filed this 6th day of May, A. D. 1889. R. R. Kirk, clerk. Sheriff's fees: Service, $—; mileage, $—; return, $—; total, $—. Jones & Riddell, attorneys for pl'ffs, Barclay block, Denver, Col.

5 STATE OF COLORADO, } ss:
Summit County, }

In the District Court.

THEODORE PANKHURST and FRED. C. SCHRODER, Plaintiffs, *vs.* THOMAS D. PRICE, Defendant. } Petition for Removal to the Circuit Court of the United States, District of Colorado.

To the district court of Summit county, State of Colorado:

Your petitioner respectfully shows to this honorable court that

the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the city of St. Louis, State of Missouri, and that Theodore Pankhurst was then and still is a citizen of the State of Colorado, and Fred. C. Schroder was then and still is a citizen of the State of Colorado, and your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Colorado, and he will ever pray.

MONTGOMERY & FROST,
Attorneys for Petitioner, Barclay Block, Denver, Colo.

STATE OF COLORADO, }
Arapahoe County, } *ss:*

—, Thomas D. Price, being duly sworn, do say that I am the petitioner named in the foregoing petition subscribed by Mont-
6 gomery & Frost, my attorneys; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true.

THOMAS D. PRICE.

Subscribed by the said Thomas D. Price and by him sworn to before me this 11th day of June, A. D. 1889.

GREELEY W. WHITFORD,
[NOTARY PUBLIC SEAL.] *Notary Public.*

My commission expires March 21st, 1892.

(Indorsed:) No. 819. Thoedore Pankhurst *et al.*, pl'ffs, *vs.* Thomas D. Price, def't. Petition for removal to circuit court of the United States, district of Colorado. Filed this 15th day of June, A. D. 1889. R. R. Kirk, clerk. Montgomery & Frost, defendant's attorneys, Barclay block, Denver, Colo.

Know all men by these presents that I, Thomas D. Price, as principal, and Edward F. Bishop and Edward S. McKinlay, as sureties, are held and firmly bound unto Theodore Pankhurst and Fred. C. Schroder in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made, unto the said Theodore Pankhurst and Fred. C. Schroder, their heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said Thomas D. Price having petitioned the district court of Sum-

mit county, State of Colorado, for the removal of a certain cause therein pending, wherein Theodore Pankhurst and Fred. C. Schroder are plaintiffs and Thomas D. Price is defendant, to the circuit court of the United States in and for the district of Colorado:

Now, if the said Thomas D. Price, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

7 Witness our hands and seals this eleventh day of June, A. D. 1889.

THOMAS D. PRICE. [SEAL.]
EDWARD F. BISHOP. [SEAL.]
EDWARD S. McKINLAY. [SEAL.]

STATE OF COLORADO, } ss:
Arapahoe County, }

We, Edward F. Bishop and Edward S. McKinlay, of said county, the sureties named in the foregoing bond, being each duly sworn, do depose and say each for himself that I am a resident of the State of Colorado and a property-holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Colorado liable to execution of the value of more than one thousand dollars.

EDWARD F. BISHOP.
EDWARD S. McKINLAY.

Subscribed in my presence by Edward F. Bishop and Edward S. McKinlay and by them sworn to before me this eleventh day of June, A. D. 1889.

[NOTARY PUBLIC SEAL.] CHARLES A. STOKES,
Notary Public.

My commission expires November 21st, 1892.

(Indorsed:) 879. In the district court, Summit county, Colo. Theodore Pankhurst *et al.*, pl'ffs, *vs.* Thomas D. Price. Bond for removal to circuit court U. S., district of Colorado. Filed and approved June 15th, A. D. 1889. R. R. Kirk, clerk. Montgomery & Frost, attorneys for def't, Barclay block, Denver, Colo.

8 STATE OF COLORADO, } ss:
County of Summit, }

Pleas in the district court of the fifth judicial district of the State of Colorado, sitting within and for the county of Summit, before the Hon. L. M. Goddard, judge of the said judicial district, at a term thereof begun and holden at Breckenridge, in said county, on the third Monday, it being the 17th day of June, A. D. one thousand eight hundred and eighty-nine.

Present: Hon. L. M. Goddard, judge; Hon. T. A. Dickson, district attorney; Hon. F. M. Brown, sheriff of said county; R. R. Kirk, Esq., clerk of said court.

THEO. PANKHURST *et al.*, *vs.* THOMAS D. PRICE. } 879.

At this day come said plaintiffs by S. W. Jones, Esq., their attorney, and the said defendant by B. F. Montgomery, Esq., his attorney, also comes. And thereupon said defendant presents to the court his petition and bond for the removal of this cause to the circuit court of the United States of the eighth judicial circuit for the district of Colorado.

And the court having examined the same, doth accept said bond and petition and doth order that this action be and the same is hereby removed to said circuit court.

And let the clerk of this court make a transcript of all orders of court had and entered of record herein, as well as of all papers filed in this behalf, and certify the same to said circuit court with all convenient speed, upon payment of all costs remaining due and unpaid in this action.

L. M. GODDARD, *Judge.*

9 STATE OF COLORADO, *Summit County,* } *ss:*

I, R. R. Kirk, clerk of the district court of Summit county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all orders of court had and entered of record (together with all of the papers filed) in a certain cause pending in said court, wherein Theodore Pankhurst and Fred. C. Schroder are plaintiffs and Thomas D. Price is defendant.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court at Breckenridge this 11th day of July, A. D. 1889.

R. R. KIRK, *Clerk.*

(Indorsed:) 2473. Transcript in suit. In district court, Summit county, Colo. In the matter of Theodore Pankhurst *et al. vs.* Thomas D. Price. Filed Oct. 9, 1889. William A. Willard, clerk.

And afterwards, and on, to wit, the 1st day of November, A. D. 1889, came the said defendant by Messrs. Montgomery and Frost, his attorneys, and filed in said court and in said cause his answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States.

Answer.

THEODORE PANKHURST and FRED. C. SCHRODER, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant. } At Law.

Comes now the above-named defendant and for answer to the first cause of action alleged in the complaint herein, says:

That he denies each and every allegation and averment therein, except the allegation "that the plaintiffs are, and at all times mentioned in this complaint, have been, citizens of the United States;" and as to such allegation, defendant says he has not and cannot obtain sufficient knowledge or information upon which to base a belief.

And this defendant for further and other answer to the first cause of action of the plaintiffs herein, alleges and shows to the court:

That the said plaintiffs are not the owners of, nor entitled to the possession of that portion of the surface ground included within the surveyed surface lines of said Puzzle Lode mining claim, particularly described by metes and bounds in the plaintiffs' complaint, as follows, to wit:

Beginning at the intersection of a line running from the corner five to corner six of the Puzzle Lode mining claim, with a line running from corner three to corner four of the Ouray Lode mining claim, whence corner No. 6 of the Puzzle Lode mining claim bears south 49 degrees 54 minutes west, 216.1 feet; thence north 49 degrees 54 minutes east, 544.3 feet; thence north 65 degrees 16 minutes east, 466.6 feet; thence south 49 degrees 54 minutes west, 536.5 feet; thence south 65 degrees 16 minutes west, 215.1 feet; thence south 65 degrees 16 minutes west 215.1 feet; thence south 64 degrees, 58 minutes west, 361.3 feet to the place of beginning.

That this defendant is the owner and is entitled to the possession thereof.

And this defendant for further and other answer herein, alleges:

That this defendant is and has been since long before the commencement of this action, the owner of, and in the actual exclusive possession of the Ouray Lode mining claim, fifteen hundred (1,500) feet in length by one hundred and fifty (150) feet in width, situate in Minnesota mining district, county of Summit and State of Colorado, and described by metes and bounds as follows, to wit:

Beginning at corner No. 1, thence south 41 degrees 35 minutes east 150 feet to corner No. 2; thence south 48 degrees 25 minutes west 750 feet to side center stake, and 1,500 feet to corner No. 3, whence peak No. 3 of the ten-mile range bears north 50 degrees 38

minutes west, and peak No. 10 bears south 73 degrees 41 minutes west; thence north 41 degrees 35 minutes west, 150 feet to corner No. 4, whence peak No. 3 bears north 50 degrees 49 minutes west, and peak No. 10 bears south 73 degrees 06 minutes west; thence north 48 degrees 25 minutes east 750 feet to side center stake, and 1,500 feet to corner No. 1, place of beginning. Var. 14 degrees 30 minutes east.

That said Ouray Lode mining claim long prior to the twenty-sixth day of September, 1885, was duly discovered and located in pursuance of, and in accordance with the laws of the United States, regulating and governing the discovery and location of lode mining claims, upon the unoccupied public mineral domain of the United States, and also in pursuance of and in accordance with the laws and statutes of the State of Colorado, and the local rules and regulations of the miners in said mining district, governing and regulating the discovery and location of lode mining claims, in said mineral mining district aforesaid.

That said Ouray Lode mining claim so owned, claimed, occupied and in the possession of this defendant as aforesaid, was long
11 prior to the eighth day of March, A. D. 1889, by divers mesne conveyances from the original discover-s and locators thereof, and their grantors conveyed to this defendant, and that this defendant has fully kept and performed all the acts and requirements of the statutes and laws of the United States, the statutes and laws of the State of Colorado, and the local rules and regulations of the miners in said mining district, governing, regulating and controlling such discoveries and locations, and now has and is entitled to the exclusive possession thereof, together with all the rights, privileges and benefits of each and every part of said lode mining claim.

That defendant and his grantors and the original discoverers and locators of said Ouray Lode mining claim, are and were at the time of discovery and location thereof, and at all times since have been citizens of the United States.

Wherefore defendant demands judgment.

That he be adjudged the owner and entitled to the possession of said Ouray Lode mining claim as herein described, and each and every part thereof.

That he recover his costs and disbursements herein.

MONTGOMERY & FROST,
Attorneys for Defendant, 33 Barclay Block, Denver, Colo.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Thomas D. Price being duly sworn, says he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

THOMAS D. PRICE.

Subscribed and sworn to before me this 30th day of October, A. D. 1889.

[SEAL.] ALFRED L. HODDER,
Notary Public.

Indorsed: 2473. In the circuit court of the United States, district of Colorado. Theodore Pankhurst, *et al.*, plaintiffs, *vs.* Thomas D. Price, defendant. Answer. Filed Nov., 1889. William A. Willard, clerk. Montgomery & Frost, att'ys for def't.

And afterwards, and on to wit, the 31st day of October, A. D. 1889, came again the said plaintiffs by their attorneys aforesaid and filed in said court and in said cause their replication to the answer heretofore filed herein.

12 And the said replication is in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Colorado.

UNITED STATES OF AMERICA, *ss:*

THEODORE PANKHURST and FREDERICK C. SCHRODER, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant.

The plaintiffs replying to the second answer of defendant say:

They deny that the defendant is the owner or entitled to the possession of the premises described in said second answer.

The plaintiffs replying to the third answer of defendant say:

They deny that the defendant is or has been at any time the owner of or in the actual or exclusive possession of the so-called Ouray Lode mining claim described in said answer, or in possession thereof at all otherwise than by trespass or parcel of the Puzzle lode described in complaint.

They deny that said Ouray Lode mining claim was ever duly discovered or located in pursuance of or in accordance with the laws of the United States or the laws or statutes of Colorado or the local rules or regulation- of the miners in said mining district, or that there ever was an actual and valid discovery or location of said so-called Ouray Lode mining claim.

That whether or not said Ouray Lode mining claim so called was at any time, by the pretended discoverers or locators thereof, conveyed to defendant, the plaintiff- has not and cannot obtain sufficient knowledge or information on which to base a belief.

Plaintiff- den*ies* that defendant has fully or at all kept or performed the acts and requirements of the statutes or laws of the United States or of the State of Colorado or the local rules or regulations of the miners of said mining district as averred in said answer, or otherwise, and deny that defendant is or ever was entitled

to the exclusive or any possession of said premises or any part thereof or the rights, privileges and benefits thereof.

JONES & RIDDELL,
MORRISON & KOHN,
Attorneys for Plaintiffs.

Verification waived.

MONTGOMERY & FROST,
Att'ys for Def't.

13 (Indorsed:) 2473. Circuit court (law). Theo. Pankhurst *et al. vs.* Thos. D. Price. Replication. Filed Oct. 31, 1889. William A. Willard, clerk. Morrison & Kohn, attorneys-at-law, 17 Clayton block, Denver, Col.

And afterwards and on, to wit, the 4th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER *vs.* THOMAS D. PRICE.	2473. Action for Possession of Specific Real Property and for Damages.

And now, to wit, this 4th day of January, A. D. 1890, on petition of plaintiffs and defendant, the plaintiffs appearing by Jones & Riddell, their attorneys, and the defendant by Montgomery & Frost, his attorneys, it is ordered by the court, by consent of all parties as aforesaid, that an inspection and survey be had of all the premises in controversy in the above-entitled cause *of* and of all workings upon or connected with the Puzzle Lode mining claim or the Ouray Lode mining claim which either party may desire to survey and inspect, including cross-cuts and tunnels as well as workings upon the vein or veins.

And that such survey and inspection do begin on the 6th day of January, A. D. 1890, and be concluded on the 12th day of January, A. D. 1890, and during daylight of such intervening period, including both of said dates, all workings of both parties shall be open to the inspectors, assistants, and surveyors hereby appointed, with all means of communication, access, ingress, and egress, so that they may come and go and return from time to time during said period, including said days, without let or hindrance or obstruction either singly or together or in parties as they may divide themselves.

And it is further ordered that the counsel of each side furnish to the counsel of the opposite side list of their surveyors,
14 assistant surveyors, and inspectors in writing twenty-four hours before the commencing said inspection and examination, and that such surveyors shall be one principal surveyor for each party, with two assistants, and the inspectors shall be limited to seven on each side, in addition to the surveyors and assistants,

and that one of the plaintiffs and the defendant may be included in the respective lists of inspectors.

And it is further ordered that any obstruction to the surveyors or their assistants or to any inspector may, as the court may be advised, be treated as a contempt of this court, and that the failure of either side to furnish a list or to insist on an inspection shall not prevent the other side from furnishing their list and making their inspection.

And afterwards and on, to wit, the 13th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

At this day come the plaintiffs, by S. W. Jones, Esq., their attorney, and the said defendant by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon comes a jury, to wit, Henry L. Shaw, Benjamin H. Bayles, Mason W. Mather, James Will, William Clemons, Allen P. Richardson, Peter J. Werley, Samuel Berry, Charles G. Strong, D. F. Carmichael, James Trevillion, Daniel Spielman, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, not to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

15 And afterwards and on, to wit, the 14th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceedings was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys, respectively, and, the said jurors being now all here present and in

the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 15th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER *vs.* THOMAS D. PRICE.	2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys, respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with each other touching the cause or the matters at issue herein or the evidence heard or
16 any part thereof, not to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 16th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER *vs.* THOMAS D. PRICE.	2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys, respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff, to consider of their verdict.

And afterwards and on, to wit, the 17th day of January, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court, present the Honorable

Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

At this day come again the said parties by their attorneys, respectively, and the said jurors now return into court. And
17 it now appearing to the court that the said jurors have not agreed upon a verdict herein, and that if longer detained they would not so agree, therefore, it is ordered that the said jurors be discharged from rendering a verdict herein.

And afterwards and on, to wit, the 16th day of May A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court, present the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

At this day come the said plaintiffs by S. W. Jones, Esq., their attorney, and the said defendant by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon comes a jury, to wit: Albert Matthews, H. L. Sutherland, Charles E. Day, John B. Church, Thomas B. Compton, M. C. Miller, James Bell, J. P. Looney, I. T. Felch, W. W. Hooper, John Nowland, Frederick Cramer, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issues herein joined, and a true verdict render according to the evidence. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

18 And afterwards and on, to wit, the 17th day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.

2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 19th day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.

2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching
19 this cause or the matters at issue herein or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 20th day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.

2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the

jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire, to meet the court at its next incoming.

And afterwards and on, to wit, the 21st day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.
} 2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 22nd day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.
} 2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard all the evidence produced and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict.

And afterwards and on, to wit, the 23rd day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court; present the Honorab-e Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

At this day come again the said parties by their attorneys respectively, and thereupon come again the said jurors heretofore empaneled and sworn in this cause, and on their oath do say they find the issues in favor of the plaintiffs and that they are entitled to occupy and possess and to receive a patent for the Puzzle Lode mining claim, survey lot No. 5599, and to recover from the defendant that parcel of said claim and survey lot described and sued for in the complaint.

21 And afterwards and on, to wit, the 27th day of May, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this day come the said plaintiffs, by R. S. Morrison, Esq., their attorney, and the said defendant, by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon, on motion of the said defendant, it is ordered by the court that he have thirty days from this day to file his motion for a new trial herein.

And afterwards and on, to wit, the 17th day of July, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.*
vs.
THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this day come the said plaintiffs, by H. S. Riddell, Esq., their attorney, and the said defendant, by B. F. Montgomery, Esq., his attorney, also comes.

And the motion for a new trial herein, coming on now to be heard, is argued by counsel, and, the court being now sufficiently advised in the premises, it is ordered by the court, for good and suf-

ficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said
22 plaintiffs and against the said defendant for possession of the lands and tenements in the said complaint described and the said plaintiffs' costs, to be taxed.

And day until sixty days from this day is allowed the said defendant within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

And thereupon and on the same day, to wit, the 17th day of July, A. D. 1890, judgment was duly entered against the said defendant in the judgment book of said court in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

On this 17th day of July, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court, there being present the Honorable Moses Hallett, district judge.

It is considered by the court that the said plaintiffs do have and recover of and from the said defendant possession of the premises, lands and tenements in the said complaint mentioned, to wit: All that part of the Puzzle Lode mining claim situate in Minnesota mining district, county of Summit and State of Colorado, which is intersected by the exterior lines of survey lot No. 5654, known as the "Ouray" Lode mining claim, said ground so intersected being described as follows: Beginning at the intersection of a line running from corner five to corner six of the "Puzzle" Lode mining claim with a line running from corner three to corner four of the "Ouray" Lode mining claim, whence corner No. 6 of the "Puzzle" Lode mining claim bears S. 64 deg. 55 min. W. 186.7 feet, and corner No. 4 of the "Ouray" Lode mining claim bears S. 49 deg. 54 min. W. 216.1 feet; thence N. 49 deg. 54 min. E. 544.3 feet; thence N. 65 deg. 16 min. E. 466.6 feet; thence S. 49 deg. 54 min. W. 536.5 feet; thence S. 65 deg. 16 min. W. 215.1 feet; thence S. 64 deg. 55 min. W. 361.3 feet to the place of beginning, and that they have a writ of possession therefor.

It is further considered by the court that the said plaintiffs do have and recover of and from the said defendant their costs by them in this behalf laid out and expended, to be taxed and have execution therefor.

23 And afterwards and on, to wit, the 6th day of October, A. D. 1890, at chambers, before the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE.

2473. Action for Possession of Specific Real Property and for Damages.

This cause coming on this day to be heard upon the motion, and application of defendant for leave to file an amended answer therein in accordance with the draft of such amended answer presented to the court, it is ordered that said defendant have leave to file such amended answer within 24 hours from the date of this order, and that plaintiffs do have thirty days to reply to said answer.

24 And afterwards and on, to wit, the 6th day of October, A. D. 1890, came again the said defendant by his attorneys aforesaid and filed in said court and in said cause his amended answer to the complaint heretofore filed herein.

And the said amended answer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

THEODORE PANKHURST and FRANK C. SCHRODER, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant.

And now comes Thomas D. Price, defendant, in the foregoing case, and by leave of court first had and obtained, files this, his amended answer, to the complaint upon file in the above-entitled action.

1. Defendant denies that on the 26th day of September, 1885, and since that time or at and since any other time, the plaintiffs, or either of them, were and are the owners of and in actual occupation of the Puzzle Lode mining claim as set out and described in clause one of the plaintiffs' complaint and lying in Minnesota mining district, Summit county, State of Colorado. Defendant, however, admits that at some time prior to the commencement of this suit and to defendant unknown, the plaintiffs did discover the Puzzle lode or vein in said mining district, and that subsequently and prior to the commencement of this action, the plaintiffs did locate according to the requirements of law a mining claim upon said vein or lode known as the Puzzle Lode mining claim; and did further duly record location certificates, original and amended, fixing the surface boundaries of said claim according to the metes and bounds set out in clause one of said complaint. And defendant alleges and shows the fact to be that a certain portion of the territory comprised within the surface boundaries of said Puzzle Lode mining

claim is in conflict with the Ouray mining claim, which said mining claim was duly and legally located, along and upon the Ouray lode or vein long prior to the discovery of the Puzzle lode or vein as is hereinafter more fully set out; the surface of conflict between said Ouray mining claim and said Puzzle mining claim being described as follows, to wit:

Beginning at the intersection of a line running from corner five to corner six of the Puzzle Lode mining claim with a line running from corner three to corner four of the Ouray Lode mining claim, whence corner No. 6 of the Puzzle Lode mining claim bears S. 64 deg. 55 min. W. 186.7 feet and corner No. 4 of the Ouray Lode mining claim bears S. 49 deg. 54 min. W. 216.1 feet; thence N. 49 deg. 54 min. E. 544.3 feet; thence N. 65 deg. 16 min. E. 466.6 feet; thence S. 49 deg. 54 min. W. 536.5 feet; thence S. 65 deg. 16 min. W. 215.1 feet; thence S. 64 deg. 55 min. W. 361.3 feet to the place of beginning; and with regard to said territory defendant alleges that he as owner of the Ouray Lode mining claim, as is more fully set out hereinafter, is the legal owner, and is entitled to the possession of the same by virtue of the Ouray mining claim being the older legal location according to the laws of the United States and the State of Colorado.

2. Defendant admits that the plaintiffs are, and always have been, citizens of the United States.

3. Defendant admits that plaintiffs claim the right to occupy and possess the premises set out in their complaint as the Puzzle Lode mining claim under the laws of the United States and of the State of Colorado, by pre-emption and actual prior possession; and moreover defendant admits that plaintiffs are entitled to occupy and possess so much of said mining claim according to their said claim of right as is not in conflict with the Ouray mining claim as above set out; as to such territory in conflict defendant alleges that he has a superior title and right as hereinbefore and hereinafter is more *more* fully set out.

4. Defendant admits that at the time set out in clause four of the complaint herein he entered upon the territory set out and described in said clause four, and that he has ever since held possession of the same; but defendant denies that such entry was wrongful or illegal; or that his holding possession is wrongful or illegal; but on the contrary defendant alleges that his entry and possession were and are right and lawful by virtue of his senior and superior claim and title to said territory as hereinbefore and hereinafter more fully stated.

And for a special answer and defence to this action defendant alleges as follows, to wit:

1. That on or about the 29th day of July, 1885, and long prior to the discovery and location of the Puzzle Lode mining claim, L. M. Thomas, H. C. Killen, C. H. Haynor, F. H. Stanton and H. B. Scott, being each and all citizens of the United States, did enter upon the vacant and unoccupied public domain of the United States and discovered a well-defined lode or vein which they called and named the Ouray lode or vein, which said lode or vein was in

place; and thereupon said parties did post at the point of discovery, on the surface, a plain sign or notice containing the name of lode, to wit: The Ouray, with the name of the locators, date of discovery, and within sixty days from said discovery they did sink a discovery shaft upon said lode which was more than ten feet deep from the lowest part of the rim at the surface and showing a plain and well-defined lode or vein of mineral-bearing rock in place; and did furthermore at the same time, mark and designate the surface boundaries of said claim by six substantial posts hewed and marked on the sides in towards the claim and well set in the ground, one post being at each corner of said claim and one
26 at the center of each side line; and thereafter, and within three months from the date of said discovery and on, to wit, the 27th day of October, 1885, the above-named locators did file in the office of the clerk and recorder of Summit county a location certificate upon said lode, containing the name of the lode, the names of the locators, the date of location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, as near as the same may be, and the width, along with said claim and which said Ouray Lode mining claim as set out and described in said location certificate is as follows, to wit: Beginning at corner No. 1, thence S. 41° 35′ E. 150 ft. to cor. No. 2, thence S. 48° 25′ W. 750 ft. to side center stake and 1,500 ft. to cor. No. 3, whence p'k No. 3 of ten-mile range bears N. 50° 38′ W. and p'k No. 10 bears S. 73° 41′ W., thence N. 41° 35′ W. 150 ft. to cor. No. 4, whence p'k No. 3 bears N. 50° 49′ W. and p'k No. 10 bears S. 73° 06′ W., thence N. 48° 25′ E. 750 ft. to side center stake and 1,500 ft. to cor. No. 1, place of beginning. Var. 14° 30′ E.

2. And defendant furthermore alleges that ever since the year 1885, and up to the present time said claim has been possessed and worked by defendant and his grantors by pre-emption and location under and in accordance with the laws of the United States and of the State of Colorado, and also by the annual performance of the assessment-work required by law, and defendant is entitled to the exclusive possession thereof and of the Ouray lode or vein, together with all the rights, privileges and benefits given to him by law.

3. Defendant furthermore shows that since the time of said location he has become the owner and entitled to the possession of said Ouray Lode mining claim by divers mesne conveyances from the original discoverers and locators and their grantors, and defendant is now the sole owner and possessor of the same.

4. Defendant further shows and alleges that all and entire the territory set out in clause 4 of plaintiffs' complaint and alleged to have been wrongfully entered upon by defendant is a part of the surface territory comprised within the surface boundaries of the Ouray mining claim.

Defendant further alleges that he has heretofore entered upon the vein or lode lying within said territory and extracted ore from the same, which said vein or lode is the Ouray vein or lode discovered in the discovery shaft of said Ouray mining claim, and which said vein or lode at its apex extends throughout the length of said Ouray

mining claim entering the territory in controversy at about the point of intersection between the south side line of the Ouray mining claim and the east side line of the Puzzle mining claim and running across the territory in controversy in this action and which said vein or lode at its apex departs from said territory in
27 conflict and from the surface territory claimed by the plaintiff- herein as the Puzzle mining claim at a point about — feet distant along the west side line of the Puzzle Lode mining claim from the point of intersection between said west side line of the Puzzle Lode mining claim and the south side line of the Ouray mining claim, and after said departure said vein or lode extends on to the end of the Ouray Lode mining claim.

And now having fully answered said complaint defendant prays that he be adjudged the owner and entitled to the possession of said Ouray mining claim hereinbefore described and all and every part thereof, and that he recover his costs and expenses herein unjustly laid out and expended.

B. F. MONTGOMERY,
HENRY W. HOBSON,
Att'ys for Defendant.

Indorsed: 2473. District court. Theodore Pankhurst *et* ano., plffs., *vs.* Thomas D. Price, def't. Amended answer. Filed Oct. 6, 1890. William A. Willard, clerk.

And afterwards, and on to wit, the 30th day of October, A. D. 1890, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause their replication to the amended answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *ss*:
District of Colorado, }

In the Circuit Court of the United States, District of Colorado.

THEODORE PANKHURST *et al.*, Plaintiffs, }
vs. }
THOMAS D. PRICE, Defendant. }

The plaintiffs, replying to the first amended answer of the defendant, say:

1. They deny that said so-called Ouray Lode mining claim was duly or legally located along or upon any so-called Ouray lode or vein long prior to the discovery of the Puzzle lode, or at any time.

2. Plaintiffs deny that the defendant is the legal owner of the so-called Ouray Lode mining claim or is entitled to the possession of the same by virtue of the Ouray Lode mining claim being the older legal location according to the laws of the United States or of the State of Colorado, and deny that the said so-called Ouray Lode

mining claim is the older legal location according to the laws of the United States or the State of Colorado.

28 3. Plaintiffs deny that as to the territory in conflict between the said Puzzle Lode mining claim and the so-called Ouray Lode mining claim the defendant has a superior title or right as in said amended answer stated or otherwise.

4. Plaintiffs deny that the entry or possession of the defendant, in paragraph 4 of his amended answer alleged, were or are right or lawful, or by virtue of any senior or superior claim or title to said territory.

Plaintiffs, replying to the second or special amended answer of the defendant, say:

1. They deny that on or about the 29th day of July, 1885, or at any time prior to the discovery of the Puzzle lode, the said persons named in paragraph 1 of said answer, or any of them, discovered a well-defined lode or vein, or any vein in place or otherwise.

2. They admit that said parties did post, at the alleged point of discovery on the surface, a notice, as charged in said paragraph 1, but deny that at that time or at any time any lode or vein, and especially any well-defined lode or vein in place, was discovered or disclosed at such alleged point of discovery.

3. They admit that they sank a shaft ten feet deep, but deny that the same was a discovery shaft or that it showed a plain or well-defined vein or lode of mineral-bearing rock in place.

4. They deny that said persons marked and designated the surface boundaries of their pretended claim by six substantial posts, as averred in paragraph 1; they admit that the two western posts were set and the two centre posts, but they deny that the east-end posts were set, as they are informed and believe, or, if set, they deny they were set at the points now claimed as the northeast and southeast corners of said so-called Ouray claim.

5. They admit that on, to wit, the 27th day of October, A. D. 1885, the said persons filed a location certificate, as alleged in said paragraph, but deny that said location certificate described the claim by reference to natural objects or permanent monuments as required by law, and aver that the bearings or so-called monuments, to wit, two certain peaks, fix or tie the said pretended location with any reasonable certainty; and they aver that said pretended location or staking and the filing of said certificate were made long after the discovery of the Puzzle lode in place in the month of July, A. D. 1885.

6. The plaintiffs deny that ever since the year 1885 the said so-called Ouray claim has been possessed or worked by defendant or his grantors by pre-emption or location, under or in accordance with the laws of the United States or of the State of Colorado and they deny that the ground in conflict between said surveys

29 was ever worked by the defendant before he cut and entered upon the vein of the plaintiffs some time in the year 1888; and they deny that the assessment-work required by law was performed upon said so-called Ouray claim, but aver that said so-called claim was abandoned and the timbers in the discovery shaft re-

moved and the same allowed to fill up in the year 1887, and that no annual labor in and about the so-called claim was done in the year 1886, and that all the work done in 1887 and since was done after said discovery shaft was abandoned and the timbers removed therefrom.

7. The plaintiffs deny that the defendant has become the owner or entitled to the possession of said Ouray Lode mining claim, or is now the sole owner or possessor of the same.

8. Plaintiffs deny that the vein or lode lying within said conflicting territory is the Ouray vein or lode, or any lode discovered in the discovery shaft of the Ouray Lode mining claim, and deny that any vein or lode at its apex extends throughout the length of said Ouray Lode mining claim except the vein of the Puzzle lode throughout the space of intersection, and whether said Puzzle lode departs from said territory in conflict at the point alleged in paragraph 4 of the amended second answer, the plaintiffs have not and can not obtain sufficient knowledge or information upon which to base a belief and therefore deny the same.

JONES & RIDDELL,
MORRISON & KOHN,
Attorneys for Plaintiff.

Indorsed: 2473. Pankhurst *et al. vs.* Price. Replication to amended answers. Filed Oct. 30, 1890. William A. Willard, clerk. Jones & Riddell, Morrison & Kohn.

30 And afterwards and on, to wit, the 3rd day of November, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record and in said cause, to wit:

THEODORE PANKHURST and FRED. C. SCHRODER *vs.* THOMAS D. PRICE.	2473. Action for Possession of Specific Real Property and for Damages.

At this day come the said plaintiffs, by Harvey Riddell, Esq., their attorney, and the said defendant, by H. W. Hobson, Esq., his attorney, also comes.

And the motion of the said defendant to retax the costs herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the sum of seventeen dollars and seventy-two — ($17.72), plaintiffs' clerk's fees, and forty-two ($42.00) dollars, for meals to jurors, and five hundred and twenty-nine dollars and seventy cents ($529.70), fees of plaintiffs' witnesses, all of the first or mistrial of this cause, be not taxed in the amount required to be paid by the said defendant to obtain a new trial herein under the statute. As to all other

matters in the said motion contained, the same are hereby overruled.

31 And afterwards and on, to wit, the 4th day of November, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of said court, present the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

At this day comes the said defendant, by H. M. Hobson, his attorney, and moves the court to vacate the judgment lately had herein and for a new trial of the issues herein.

And it appearing to the court that the taxed costs of the last trial herein have been fully paid and discharged by the said defendant: Therefore it is ordered that the judgment lately and on the 17th day of July last past had herein be vacated and for naught held, and that a new trial of the issues herein joined be had in pursuance of the statute in such case made and provided.

32 And afterwards and on, to wit, the 26th day of October, A. D. 1891, at chambers, before the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in the said court and in said cause, to wit:

THEODORE PANKHURST *et al.*
vs.
THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

This cause coming on this day to be heard, upon application of both parties hereto for an order of survey, it is ordered by the court, by consent of parties, that inspection and survey be had of all the premises in controversy in the above-entitled cause and of all workings upon or connected with the Puzzle Lode mining claim and the Ouray Lode mining claim which either party may desire to survey and inspect, including cross-cuts and tunnels, as well as workings upon the vein or veins, and shall include the Little Cally tunnel and all workings therefrom which lie towards or on the same side as the Puzzle discovery shaft.

That such survey and inspection shall commence on the 16th day of November, 1891, and be concluded at 12 o'clock at night on the 28th day of November, 1891, and during said period all workings shall be open to such witnesses, inspectors, surveyors,

and assistants as may be selected by the parties, with all means of communication, access, ingress, and egress, so that they may come and go at any time during said period without let, hindrance, or obstruction on the part of any person, whether singly or together or in parties, as they may choose: Provided, however, that the number of persons to examine and inspect shall be limited to twenty (20) on each side, and before any person shall be allowed to enter said premises for examination his name shall be furnished in writing by the party in whose behalf he examines to the opposite party or some one representing him or them. This clause, however, shall not apply to attorneys for either party, for they shall have the right to go into said mines at any time and whenever they may choose to do so.

And it is further ordered that any obstruction to the inspectors, witnesses, or examiners who may wish to examine said mine
33 under this order or to the attorneys of the parties shall be treated as contempt of this court, and the failure of either side to furnish a list of names of parties to examine shall not prevent the other side from furnishing names and having inspection made as hereinbefore provided for.

And afterwards and on, to wit, the 11th day of November, A. D. 1891, at chambers, before the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* *vs.* THOMAS D. PRICE } 2473. Action for Possession of Specific Real Property and for Damages.

This cause coming on this day to be heard for the application of defendant for leave to do certain development work, it is ordered by the court that said defendant shall have leave to enter upon the territory in controversy in this action and to do the following work:

First. To commence at a point upon the north wall of the court drift and at its extreme westerly —, and to drive a drift in a westerly direction upon a vein there shown to depart from the vein in the main drift for a distance not exceeding fifteen feet.

Second. To commence at any point in the upper Ouray level within fifty feet from a point immediately above the extreme western end of the court drift, and to drive a drift upon a vein alleged to depart from the main Ouray upper drift in an easterly direction for a distance not exceeding forty feet.

In doing said work said defendant shall not remove any ore from the workings, but will store the same in some convenient place, subject to the order of this court.

34 And afterwards, and on, to wit, the 27th day of November, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court, present the Honorable Moses Hallett, district judge, the following further proceed-

ing was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST *et al.* } 2473.
vs.
THOMAS D. PRICE.

At this day come the said plaintiffs, by R. S. Morrison, Esq., their attorney, and the said defendant, by H. W. Hobson, Esq., his attorney, also comes.

And thereupon comes a jury, to wit, James R. Williams, J. W. Miller, Nathan T. Plummer, John G. Held, Patrick Rigney, Milo F. Case, Joseph Patton, E. W. Clark, L. J. Bolt, Winton Smith, John L. Russell, L. C. Mead, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the matter at issue herein joined between the parties to this cause and a true bill render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof, nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

35 And afterwards and on, to wit, the 28th day of November, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* } 2473. Action for Possession of Specific Real Property and for Damages.
vs.
THOMAS D. PRICE.

At this day came the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard by others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 30th day of November, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* vs. THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this — come again the said parties, by their attorneys, respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof, nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

36 And afterwards and on, to wit, the 1st day of December, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* vs. THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this — come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 2nd day of December, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* vs. THOMAS D. PRICE. } 2473. Action for Possession of Specific Real Property and for Damages.

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court

not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof not to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

37 And afterwards and on, to wit, the 3rd day of December, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* } 2473. Action for Possession of Specific Real Property and for Damages.
vs.
THOMAS D. PRICE. }

At this day come again the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 4th day of December, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THEODORE PANKHURST *et al.* } 2473. Action for Possession of Specific Real Property and for Damages.
vs.
THOMAS D. PRICE. }

At this day come the said parties, by their attorneys respectively, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matter at issue herein or the evidence heard or any part thereof nor to listen to such conversation by others, are per-
38 mitted to retire to meet the court at its next incoming.

And afterwards and on, to wit, the 5th day of December, A. D. 1891, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

39 *Action for Possession of Specific Real Property and for Damages.*

THEODORE PANKHURST *et al.*
vs.
THOMAS D. PRICE. } 2475.

At this day come again the said parties by their attorneys, respectively, and the said jurors being now all here present and in the jury-box the trial herein is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on the same day come again the said jurors and upon their oath do say they find the issues in favor of the plaintiffs, and that the plaintiffs are the owners of and are entitled to occupy and possess and receive of and from the defendant the ground, lode and premises described in the complaint and sued for, with seventy-five dollars expended in support of plaintiffs' adverse claim.

And afterwards and on, to wit, the 15th day of February, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1891, of said court, present the Honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST *et al.*
vs.
THOMAS D. PRICE. } 2473.

At this day come the said plaintiffs, by R. S. Morrison, Esq., their attorney, and the said defendant by Willard Teller, Esq., his attorney, also comes.

And the motion of the said defendant for a new trial herein coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it is ordered by the court for good and sufficient reasons to the court appearing that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant for possession of the premises in the said complaint described for seventy-five dollars ($75), his damage, and the said plaintiffs' costs to be taxed.

And day until sixty (60) days from this day is allowed the said defendant within which time to file his bill of the exceptions
40 reserved by him upon the trial of the issues herein joined and supersedeas bond, upon writ of error will be in the sum of five thousand dollars ($5,000).

And thereupon, and on the same day, to wit, the 15th day of February, A. D. 1892, judgment was duly entered against the said defendant in the judgment book of said court in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Action for Possession of Specific Real Property and for Damages.

THEODORE PANKHURST and FRED. C. SCHRODER
vs.
THOMAS D. PRICE. } 2473.

On this 15th day of February, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1891, there being present the Honorable Moses Hallett, district judge.

It is considered by the court that the said plaintiff do have and recover of and from the said defendant possession of all that part and parcel of the Puzzle Lode mining claim situate in Minnesota mining district, county of Summit and State of Colorado, described as follows, to wit:

Beginning at the intersection of a line running from corner five to corner six of the "Puzzle" Lode mining claim, with a line running from corner three to corner four of the "Ouray" Lode mining claim, whence corner No. 6 of the "Puzzle" Lode mining claim bears S. 64 deg. 55 min. W. 186.7 feet and corner No. 4 of the "Ouray" Lode mining claim bears S. 49 deg. 54 min. W. 216.1 feet, thence N. 49 deg. 54 min. E. 544.3 feet; thence N. 65 deg. 16 min. E. 466.6 feet; thence S. 49 deg. 54 min. W. 536.5 feet; thence S. 65 deg. 16 min. W. 215.1 feet; thence S. 64 deg. 55 min. W. 361.3 feet to the place of beginning, and that they have a writ of possession therefor.

It is further considered by the court that the said plaintiffs do have and recover of and from the defendant seventy-five dollars ($75) damages and their costs by them in this behalf laid out and expended, to be taxed and have execution therefor.

And afterwards, and on, to wit, the 14th day of April, A. D. 1892, came again the said defendant by his attorneys aforesaid, and filed in said court and in said cause his bill of exceptions reserved by him upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

41 In the Circuit Court of the United States within and for the District of Colorado.

Bill of Exceptions.

THEODORE PANKHURST, *et al.*, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant. }

Be it remembered, that on the 27th day of November, 1891, the

same being one of the regular judicial days of the November term, 1891, of the above court, the above-entitled action came on for hearing upon the issues therein made. And at the trial of said cause the following testimony for and on behalf of the plaintiffs and defendant was introduced by the said parties respectively, and the following proceedings were had and taken after the jury empaneled in said cause had rendered their verdict therein.

And the plaintiffs, to maintain the issues on their behalf, introduced in evidence the location certificate and the amended location certificates, which said location certificates are to the following effect, to wit:

Original Certificate.

Theodore Pankhurst and F. C. Schroeder, on the 26th day of September, 1885, duly located according to law, 1,500 lineal feet horizontal measurement on the Puzzle lode. (Here follows description by courses, metes and bounds.)

(Signed) THEODORE PANKHURST.
F. C. SCHROEDER.

Attest: S. C. WHIPPLE.

Date of location, Sept. 26th, A. D. 1885.
Date of certificate, Dec. 16th, A. D. 1885.
Certificate of clerk and recorder that above location certificate was filed December, 18th, 1885.

First Amended Location Certificate.

Theodore Pankhurst and Frederick C. Schroeder, Sept. 27th, additionally located and claimed, in compliance with the laws of the United States, the Puzzle Lode vein, ledge or deposit. (Here follows description of claim by metes and bounds.)

This additional location certificate is made under the statute and without any waiver of rights acquired under original location.

42 "Said lode was discovered on the 26th day of September, A. D. 1885."

(Signed) THEODORE PANKHURST.
FREDERICK C. SCHROEDER.

Date of additional location, Sept. 27th, A. D. 1888.
Date of additional certificate, Sept. 27th, A. D. 1888.
Certificate of clerk and recorder that above certificate was recorded Sept. 28th, 1888.

Second Amended Location Certificate.

Theodore Pankhurst and Frederick C. Schroeder, claimed by right of relocation, as well as by original ocation and amended location certificates, 1,295.6 feet along the Puzzle lode, with 71 feet on each

side of the middle of the vein. (Here follows description of claim by metes and bounds.)

"Being the same lode originally discovered in place, on September, 26th, 1885, location completed December 16th, 1885, and its original certificate recorded December 18th, 1885, in Book 7, page 519, in the office of the clerk and recorder of said county; amended certificate recorded in said office September 28th, 1888."

Relocation certificate made without any waiver of any previous right, but to correct errors.

(Signed) THEODORE PANKHURST.
F. C. SCHROEDER.

Certificate of clerk and recorder that above certificate was recorded January 6th, 1890.

And to further maintain the issues on their behalf, the plaintiffs introduced the following oral testimony:

JAMES THEODORE PANKHURST, one of the plaintiffs, gave testimony on his own behalf, tending to prove and upon the following material points:

Is one of the owners and discoverers of the Puzzle lode; a native-born citizen; Schroeder is the other owner; first went to prospect on Brooks hill, where the claim is situated, June 19th, 1885; was alone until July 6th, when Schroeder came up; been mining 14 years in Summit county, near Breckenridge; first work done in prospecting was outside of Puzzle claim; an open cut; found the flow of ore there; found same kind of stuff in stope on ground. (Witness then described at length the work he did on ground.) Found the vein in the first working that they opened up; drifted on the vein about 20 feet in a tunnel; he and Schroeder sunk discovery shaft and took specimens from the same containing free gold; witness sunk discovery shaft at legal depth, showing top
43 of apex of the vein in place; discovery shaft now connected with lower workings and several workings described in detail; witness and Schroeder worked the Puzzle vein shown in the discovery shaft through tunnels up to the connection with the workings of the Ouray parties, where they were stopped, and into the ground in controversy shown by diamond-shaped yellow piece upon maps; line upon maps marked in blue shows the Puzzle vein and the only vein that witness ever saw in that ground, which vein extends from the Puzzle discovery shaft into and through the ground in controversy; departs from ground in controversy at a point shown by blue line upon map; good-sized vein; 12 feet in some places; working on vein at present time and milling it; some of the ore has been shipped and some milled; produced a number of certificates showing returns of ore shipped, which was taken from the Puzzle vein at different points, in the years 1885, 1886 and 1887, which certificates aggregate from $1,000 to $2,000 in value; had claim surveyed in December, 1885, by Whipple; placed discovery

notice at the discovery shaft, marked according to law; claim 75 feet on each side of discovery and 1,500 feet in length; put up location stakes according to law; designated claim as described in location certificate and showed same on map introduced in evidence; survey for stakes and location was made December 18th, 1885; was working continuously on claim from June 19, '85, up to time the survey was made; there almost every day; Schroeder was with him; delay in making survey was because he could not determine the course of the vein; the date placed at the discovery shaft for discovery was on the 26th day of September; discovery stake was put as close to the shaft as he could; continued working the claim through the years 1885, '86 and '87 almost continuously; had men to work on the claim; took ore out of the first level on property in 1885—upper level; ore ran well in gold and silver. Testified at length about ore taken from the property.

Cross-examination:

Put up the first stake about the 11th of July at open cut; thought they had the vein there, but did not have it; found the vein first in breast of tunnel near the open cut; discovered vein on 26th of September, 1885; that was when he was positive the vein was in place; struck vein 8 or 10 feet down in the discovery shaft; continued to sink through the vein to the depth of about 20 feet; rest of the discovery shaft, after going through the vein, is in country rock; about 20 feet of upper level was run in September, 1885, which was on course of the vein. Knew that other parties were prospecting on same hill in the immediate vicinity; knew that the Ouray locators claimed a location before Puzzle survey was made, and that they had surveyed the Ouray claim early in November; knew in De-
44 cember, when Puzzle claim was surveyed, that the Ouray claim had been surveyed, staked and location certificate recorded; knew where the Ouray stakes were; saw part of them. The Puzzle vein on lower level in ground in controversy, before Ouray workings are reached, contains heavy bodies of pyrites of iron and copper.

FREDERICK SCHROEDER, one of the plaintiffs, gave testimony on his own behalf to the same effect as testimony given by James Theodore Pankhurst, and upon the same material points, which testimony tended to prove:

That he and Pankhurst claimed to have discovered the Puzzle vein in the latter part of June or early in July, 1885, and that they located the same on the 26th of September, 1885, and did and performed the various acts required by law for the purpose of making a valid location upon said Puzzle vein; that said vein extended from the discovery shaft on the Puzzle claim up to and through a portion of the territory in controversy, as shown on the maps, and departed from the territory in controversy at the point shown by blue line on the maps introduced in evidence by the plaintiffs; that since the location he and Pankhurst had worked said vein continuously up — the beginning of this suit. Witness also testimony of

other material facts to a similar effect as set out in the testimony of the witness Pankhurst.

S. C. WHIPPLE gave testimony tending to prove and upon the following material points:

Is a surveyor by business; knows the properties in controversy; described the property and the country at length; refers to the maps hereinafter referred to as introduced in evidence; testifies that he helped make them and that the same are correct; he made survey for location on the Puzzle vein December, 1885; took the course of the vein from tunnel which had been run in upon the same; laid off the ground from the discovery shaft; described location certificate, which was in accordance with law in its terms: also testified as to other acts necessary to make valid location of claim; found a true fissure vein in the discovery shaft of the Puzzle, which has been connected with the main workings upon the Puzzle lode; vein runs as indicated by blue line on map; runs in and through ground in controversy as shown by blue line; vein shown in discovery shaft of Puzzle claim about 7 or 8 feet in depth and is open to connection with lower levels on the Puzzle and shows all the ore; the vein was shown in place when he surveyed for location in December, 1885; there was no connection between the discovery shaft and the vein as shown in the Puzzle tunnels until 1888.

At the end of this witness' testimony it was admitted as a fact by the defendant that this suit was brought in support of an adverse claim on the part of the owners of the Puzzle lode against the owners of the Ouray lode, and that $75.00 were expended as charged in the complaint, and that the boundaries in conflict between the two claims are correctly set out in the complaint.

GEORGE P. WALKER, a surveyor, gave testimony to the same effect as the witness S. C. Whipple, and upon the same material points:

Showing where the Puzzle location shaft was situated; position of the workings as shown upon the maps, and that the Puzzle vein extended continuously from the Puzzle discovery shaft down through the workings connecting said shaft with the levels and out through the levels to the territory in controversy and through said territory to a point indicated on the map by blue line, where it departed from said territory in conflict.

Plaintiffs rested their case.

And thereupon, the defendant, to maintain the issues in his behalf, introduced a large number of witnesses referred to more in detail hereinafter, who gave testimony tending to prove the following facts and upon the following points:

That the locators of the Ouray Lode mining claim commenced to prospect for the Ouray vein about the middle of July, 1885;

That on July 29th, 1885, the legal and valid location was made

upon a well-defined vein of mineral or mineral-bearing rock in place in country rock, and called the "Ouray" vein or lode;

That thereafter and in the time required by law a legal and valid location was made upon said vein or lode and called the "Ouray Lode mining claim," described by metes and bounds as set out in the pleadings in this action;

That no vein or lode whatsoever was shown or disclosed in the discovery shaft of the Puzzle Lode mining claim, or in any of the surface workings upon the Puzzle claim, and there was no legal or valid discovery of the vein until the year 1887 upon said Puzzle claim when the vein or lode was discovered in a tunnel run upon the same; and that there was no legal discovery or location of said Puzzle vein until the year 1887, prior to the beginning of this suit;

That the Ouray lode or vein is a continuous and well-defined lode or vein of mineral or mineral-bearing rock, carrying gold, silver and other minerals in place, and extends from the Ouray discovery shaft down through the workings upon the Ouray claim, out through the territory in conflict between the Puzzle and Ouray claims, and on past said surface in conflict into the territory of the Ouray claim beyond;

That said vein at all points in said workings was shown to be a strong and well-defined vein of mineral-bearing rock with well-defined walls on each side, and varying in width from 6 or 8 inches up to 5 or 6 feet;

46 That said vein showed continuously mineral in appreciable quantities, as shown by samples and assays and other tests, and was such a vein as is referred to in the Statutes of the U. S., as understood by miners, upon which a location could be made, and which a miner would follow with the hope and expectation of getting pay ore;

That the said Ouray vein, from the Ouray discovery shaft out beyond the territory in conflict, has strongly marked characteristics in the way of vein filling, vein materials and minerals, which could be easily traced and followed, and which are totally dissimilar to and different from the Puzzle vein;

That the Puzzle vein was a strong, well-defined vein, commencing at the east end of the Puzzle claim and extending through said claim up to the territory in conflict between the two claims, and on through the same; that said vein also has strong characteristics in the way of vein filling, material, etc., and that the Puzzle and Ouray veins could be easily distinguished each from the other, and could be easily followed on the ground by such characteristics;

That there was a clear crossing of the two veins on their strike shown in the surface in conflict, and that development work had been done on each vein, showing the same beyond the point of crossing;

That the defendant in this suit was entitled to a verdict for the territory in conflict by reason of having a good and valid discovery and location, prior in date to the discovery and location of the Puzzle vein; and was furthermore entitled to that portion of the vein in controversy which lies in the territory in conflict beyond the

alleged point of crossing, as being the continuation of the Ouray vein, as disclosed in its discovery shaft and workings east of the territory in conflict, which said vein crosses the Puzzle vein on its strike within the territory in conflict.

The testimony introduced by the defendant being as follows:

EDWARD D. PRICE, a witness on behalf of the defendant, gave testimony tending to prove and upon the following material points:

Is a brother of the defendant; superintendent of the Ouray claim; became connected with the Ouray property in 1887, latter part of the year, when the defendant bought the same; defendant's action in buying the Ouray claim was in nowise affected by the fact that it was near the Puzzle; there was nothing to indicate any connection between the two; been engaged in mining 25 or 26 years. (Describes maps and models introduced by the defendant in evidence.) The long cross-cut tunnel driven from surface into main Ouray tunnel, was mostly driven when defendant bought the property; defendant continued same to present connection
47 with main Ouray tunnel. Pointed out the Ouray discovery shaft and the incline upraise connecting main Ouray level with the discovery shaft; colored lines on maps show the Ouray and Puzzle veins as developed in various workings; testifies to correctness of maps; made them personally; the upper level on the Puzzle vein outside of territory in controversy, shows well-defined vein; no evidence of vein in any of the workings of the Puzzle claim made in the year 1885; examined the Puzzle discovery shaft to a depth of 25 feet; took forty different samples from the same; no appearance of a vein or crevice in the Puzzle discovery shaft whatsoever; an open cut run from the Puzzle discovery shaft about 18 feet, after the commencement of this suit; shows the top or apex of the Puzzle vein; describes at length vein shown in the Ouray workings; testifies that about 2½ to 3 feet from the original bottom of the Ouray discovery shaft a well-defined lode or vein of mineral or mineral-bearing rock in place is disclosed from 12 to 18 inches wide; the incline upraise from the main Ouray level to the bottom of the Ouray discovery shaft, made upon the Ouray vein, which vein can be plainly traced and followed from the bottom of said shaft down through the incline upraise to the bottom of the main Ouray level; the Ouray vein can also be traced back in the level from the foot of the incline upraise to a point under the Ouray discovery shaft, and thence through an upraise towards the shaft; the Ouray vein can also be plainly traced west through the territory in controversy and out beyond the same; solid formation shown in the Ouray discovery shaft is three or four feet above the original bottom and about 23 feet from the surface; located the bottom of the old shaft by timbers found there; just above bottom of the discovery shaft there is an apparent split in the vein—one part going down to the incline upraise and the other part going off towards the south, upon which the original locators had *tra* a cross-cut; in the bottom of the discovery shaft the solid wall rock and country rock is plainly to be seen

with the vein running between them; (produces samples of vein matter taken out of the bottom of discovery shaft); testifies that it is the characteristic vein filling of that section of the country, being a mineral-bearing stuff; defines vein to be a fissure between walls, the filling of which differs from the walls which enclose it, and carrying mineral in greater or less quantities, and having country rock on each side; the specimen produced as coming from the discovery shaft is true vein filling or mineral-bearing rock, according to the meaning of miners, about 18 inches wide; in the discovery shaft of the Ouray, as originally sunk, there is certainly a well-defined vein in place, according to the meaning of miners; there is not a place in the incline upraise descending from the bottom of discovery shaft to the main Ouray level, where you can examine between the timbers, which does not show a continuous vein in place; an incline upraise was run on the vein, mostly with pick; in running the incline upraise, fol-
48 lowed the vein and nothing else; from the bottom of the incline upraise, on westward through the main Ouray level, the vein is followed continuously on that level, showing well-defined vein in every part and from place to place, mineral; vein through Ouray level several feet in depth; Ouray vein followed continuously through the Ouray level out to the point of junction with Puzzle vein, with well-defined wall of country rock and vein filling—meaning mineral-bearing matter—between; vein followed is the same vein shown in the Ouray discovery shaft and in the incline upraise running from the bottom of the same; vein shown in Ouray discovery shaft and in said workings is a mineral-bearing vein, in the miner's sense—one that he would follow with the hope of getting pay ore; at various points through the main Ouray level, mineral is found of good values; at several points little veins are found running off from the Ouray vein, which is shown in the workings; as the Puzzle and Ouray veins approach each other, little veins or stringers run from one vein to the other, which have been followed by cross-levels from one vein to the other, as shown on the map; it is a common thing in the neighborhood of true fissure veins to find stringers or feeders like this; such do not in anywise affect the continuity of the Ouray vein; witness produced specimens taken from the roof of the Ouray level and from the vein at numerous points; taken from the Ouray discovery shaft and on through the Ouray level and out beyond crossing with the Puzzle vein; samples of vein and vein matter taken from all the points, similar in character, and is a characteristic vein filling of the Ouray vein; there is no practical difference in the vein filling and the vein matter found in that portion of the Ouray vein beyond the point where the Ouray level crosses the Puzzle vein, and which is claimed by the Puzzle people to be the Puzzle vein, and that portion of the Ouray vein east of the Puzzle vein. Witness produces samples and describes them in detail, showing similarity in the various ones; also produces samples of wall rock and of country rock; testifies to the jury, that from the Ouray discovery shaft, out through the ground in controversy and on to the end of the Ouray claim beyond the

ground in controversy is found the same continuous vein, having similar walls and similar vein filling or material-bearing stuff; produces samples of vein filling taken from Puzzle vein, and also country rock; testifies that it is entirely different from the vein filling of the Ouray claim; shows differences; testifies that the vein filling of the two veins is totally different in character, mineral and others respects; produces samples of mineral taken at different points along the Ouray vein east of the point of crossing with the Puzzle vein; the characteristic vein filling of the Ouray vein is a soft, gougey white material, showing very little free mineral; characteristic vein filling of the Puzzle is heavy pyritic matter, carrying iron and copper; characteristic mineral of the Ouray vein, both east and west of the point claimed to be a crossing with the Puzzle, is silver; that of the Puzzle
49 vein is gold. Witness traced the Puzzle vein by its characteristic mineral, vein filling and walls, from the Puzzle workings east of the ground in controversy into the ground in controversy, and across the Ouray vein about 20 feet as shown on the map.

The developments on the ground plainly show two veins—one, the Ouray, extending from the Ouray discovery shaft westward through the ground in controversy and beyond, as shown in workings on map, and the other, the Puzzle vein, extending from the eastern end of the Puzzle claim into the ground in controversy and across the Ouray vein as far as developed; Puzzle vein also shown on beyond in a southwesterly direction, by a cross-cut run from the Ouray and by drift run from the end of said cross-cut; the developments upon the ground actually show as a fact that the Puzzle and the Ouray veins cross; there is no similarity whatsoever between the Puzzle and the Ouray veins; near the point of crossing each vein shows some of the characteristic filling of the other, but when you get beyond the point of crossing the characteristic filling dies out; you find no iron pyrites as a characteristic vein filling of the Ouray vein, either east or west, except within 15 or 20 feet of the point of crossing, and in a little distance it disappears entirely from the Ouray vein, and that vein both east and west of the point of crossing is the same; the same crossing of veins is shown in the upper levels indicated on maps by dotted lines, and where two distinct veins cross each other, as represented, with the same difference of characteristic vein filling, etc.; these veins are the Puzzle and the Ouray; at a point in the main Ouray level some distance west of the crossing, an upraise has been made and a cross-cut driven to the south, which cuts a vein having the same characteristics and general features as the Puzzle vein, and which is shown on the maps and models; in his opinion this is the extension of the Puzzle vein after the crossing with the Ouray; through the portions of the Ouray vein west of the Puzzle vein, and which portions are claimed by the plaintiffs to be upon the Puzzle vein, many places can be found as bare of mineral and as barren as in any other portions of the Ouray vein east of the crossing, and places where the vein is as badly defined; this is the portion of the vein which is admitted by plaintiffs to be a true

vein and claimed by them to be the Puzzle; from the Ouray discovery shaft to the point of crossing with the Puzzle there are not many points in the Ouray vein which would pay to work; points at several places which are rich enough if the mineral existed in sufficiently large quantities; the vein, however, is a mineral-bearing body, containing milling ore from point to point; no shipping ore struck in the Ouray until you get considerably to the west of the crossing with the Puzzle. Witness has examined personally the Texas tunnel running to the Ouray level east of the crossing of the Puzzle, and also the Little Callie tunnel, a cross-cut tunnel run from the Ouray level west of the point of crossing; finds no veins shown in said cross-cuts except the Puzzle and Ouray; the course of the Ouray vein from the Ouray discovery shaft out through the territory in controversy, is a continuous and regular one, and the course of the Puzzle vein is also continuous and regular. The two veins cross as indicated. All the workings of the Ouray in controversy, as shown on the maps, both on the tunnel and Ouray veins, were made by the defendant.

Cross-examination:

Witness is interested in the Ouray property, although title is held in his brother's name; examined the Puzzle workings before they bought the Ouray; examined them simply in a casual manner, as a visitor; did not even know what the name of the Puzzle was; did not think the Puzzle people had a lode when he examined it first. Describes at length the workings upon the Ouray property when they were made, and for what purpose. In sinking the Ouray discovery shaft, the locators left the vein and went off on the cross-cut, following a portion of the vein 15 or 20 feet to the north; that was a branch of the vein shown in the discovery; is not the same branch of the vein that is shown in the incline upraise in the lower Ouray workings. The Ouray vein is mineralized at all points; does not mean that it is a paying vein; does not find any rich ore; through it at several points ore is found that shows good values—good milling proposition; ore that you can see with the eye; points out several places where visible mineral can be seen free; found from one to two inches of ore, carrying mineral at several places along workings; workings upon Ouray vein cost several thousand dollars; no stopes in working east of where the Puzzle vein is struck; no ore taken out of Ouray vein east of where the Puzzle vein was struck, is found which would pay to ship; never found any ore in that part of the workings in sufficient quantities to pay to work. Question of whether vein would pay to work had nothing to do with matter of its being a true vein; never saw any samples of ore carrying free gold in Ouray vein; ore in paying quantities first commenced in Ouray workings west of point where the workings reached the Puzzle vein; from Puzzle discovery shaft, on west through the territory in controversy good mineral can be found almost continuously, in some places in paying quantities, in others not; the first connection between the Ouray level and the Puzzle vein was through the cross-cut level shown on the maps; connection was then made by work-

ings a little to the west, in and under the cross-cut levels; the connection as now shown by separate level was not made until after the second trial of the case; witness never testified to the crossing of veins at the first and second trials of the case; prior to the third trial testified that there was a split in the vein on its eastern strike; development then made convinced witness of such fact; since the second trial and before the third trial new work done showed crossing of veins, and that they were entirely separate and independent; the vein to be a true vein need not be a paying
51 vein; very few veins pay from the discovery shaft or until you work them for some distance; frequently very rich ore is found in such small quantities that it does not pay to ship.

H. B. SCOTT gave testimony tending to prove the following points:

Is a native-born citizen of the United States; one of the original locators of the Ouray claim; sold it to Mr. Price, the defendant; first went upon the hill where the claims in controversy are located about the middle of July, 1885, to prospect; did a large amount of prospecting and development work upon the surface, in the way of digging holes and hunting for the vein, up to July 28th, when he discovered the Ouray vein by an open cut, which was 16 feet at the breast, and which ran into the Ouray discovery shaft; discovered the vein eight or ten feet below the surface; the next day, July 29th, put up discovery stake on Ouray claim, at the open cut, marked according to law, claiming 1,500 feet on the vein east and west; the vein was discovered and located on the 29th of July, 1885; after making discovery witness and his colocators did a good deal of work for the purpose of determining the course of the vein; did not put up a discovery stake until after the vein was discovered in place; describes the location stake. From the breast of the open cut, where the vein was discovered, sunk shaft, making in all from the surface 23 or 24 feet; shaft was on the vein from the breast of the open cut and through rock in place; vein varied from 3 to 4 inches until about 6 feet above the bottom of the shaft, where it split, one part going straight down and the other part going off to the north; locators cross-cut to that part going off to the north with a cross-cut drift; that in original work of location the locators cross-cut to part of vein going off to north and found in breast of cross-cut and thought that part was the extention of vein discovered; the other portion was in the bottom of the discovery shaft when they stopped working, plainly to be seen; the claim was located on the vein, as it outcropped at its apex, as shown in the open cut; the discovery shaft was sunk within 60 days from date of discovery of the vein; testifies that location was completed by surveying and staking claim, according to law, and filing location certificate, according to law; survey, staking and filing location certificate was within three months from the date of discovery; testifies in detail as to the acts of location, recording, etc.; knew the locators of the Puzzle claim, and saw them prospecting; during 1885 was con-

stantly at their workings; on the 29th of July, 1865, when the Our-y lode was discovered, the Puzzle vein had not been discovered, and was not discovered until about the middle of February, 1887; there is nothing whatsoever shown in the surface workings of the Puzzle claim from 1885 to 1887; no vein whatsoever shown in the Puzzle discovery shaft; nothing having the appearance of a vein.

52 Witness then gave further testimony to the same effect and upon the same points as the testimony given by the witness Edward Price, above set out, viz.: That a true fissure mineral-bearing vein, according to law, is shown in the Ouray discovery shaft, several feet above the bottom of the same and about 18 inches wide; that such vein continued as a true mineral-bearing vein from said Ouray discovery shaft down through the incline upraise to the Ouray main level; it is to be seen at all points in the main Ouray level, and continued unbroken westward through and across the Puzzle vein on to the territory in dispute and beyond; that there was no point in said workings where the vein could not be seen and followed as a true fissure, mineral-bearing vein; that the Puzzle vein was an entirely separate and distinct vein which crossed the Ouray vein as shown upon the map; that the Ouray and Puzzle veins were entirely distinct and separate, having entirely separate and distinct vein fillings, mineral characteristics and other features. The testimony of the witness upon these points is substantially the same as the testimony of the witness Price.

Witness further testified that the maps introduced by the plaintiffs in this case were not correct representations of the workings on the ground, and that the maps introduced by the defendant were correct.

C. H. HAYNOR gave testimony substantially the same as testimony given by H. B. Scott, on the subject of prospecting for the Ouray lode, the discovery and location of the same, which testimony was to the effect that he was one of the locators of the Ouray lode; that he and his colocators commenced prospecting for said lode about the middle of July, 1885, and completed their location as set out in the testimony of H. B. Scott.

C. B. CRAMER, a United States deputy mineral surveyor, gave evidence substantially similar to the testimony of witness Edward Price, and to the fact that there was no vein or veins whatsoever shown in the surface workings of the Puzzle claim, and that no vein was shown except in the workings which were run in 1887; that there was a well-defined vein of mineral and mineral-bearing rock in place shown in the Ouray discovery shaft at a depth of about 20 feet below the surface, and that said vein was continuous from said shaft down through the incline upraise in the bottom of said shaft to the main Ouray level; that said vein could be traced continuously from said Ouray level through and across the Puzzle vein through the territory in conflict, and on into the Ouray claim beyond the territory in conflict; that said vein was at all points a

well-defined mineral-bearing vein, carrying gold, silver and other minerals, with well-defined walls of country rock; that said vein was uniform in its character as to vein filling, vein material, mineral and wall, both east and west of the Puzzle vein; that the Puzzle vein was an entirely separate and distinct vein from the
53 Ouray vein, having entirely different characteristics, as to vein filling, mineral, and in other respects; that the Ouray and Puzzle veins clearly and distinctly crossed within the territory in conflict and as shown on the maps. Testimony in other respects corresponds with the testimony of the witness Edward Price.

He furthermore stated that the maps introduced by the plaintiffs were not correct representations of the workings on the two veins, but that the maps introduced by the defendant were correct; that he had surveyed all of the workings and was familiar with the same. Witness furthermore produced a large number of samples, which he identified as having been taken from different points in the Ouray vein, and which he testified were mineral-bearing rock of which vein material is composed, and carried mineral of different kinds and in different quantities; that there was no place in the Ouray discovery shaft out to where the Ouray vein crosses the Puzzle; that good vein filling and matter could not be found carrying mineral in appreciable quantities and lying between well-defined walls. He also testified at length as to the different characteristics of the vein filling, producing specimens and explaining the same.

J. B. CONRAD gave testimony to the effect that he was a miner by business, and had been engaged in said business fourteen years; that he was foreman upon the Ouray mine and was thoroughly familiar with the workings; that the maps introduced by the plaintiffs in this case were not correct representations of the underground workings, and that the maps and models introduced by the defendant were correct representations; he furthermore gave testimony *in extenso* to the same effect and upon the same points as testified to by the witnesses heretofore mentioned, as to the Puzzle claim and what is shown therein, and as to the Ouray claim and the vein or lode shown therein, and as to the crossing of the Puzzle and Ouray veins.

THEODORE F. VAN WAGENIN, a civil and mining engineer, gave evidence tending to prove the same facts and upon the same points testified to by the witness Price and the other witnesses above mentioned.

E. S. METZ, a miner by business, engaged in mining for the past 14 years, gave testimony tending to prove the same facts and upon the same points as testified to by the witness Price and the other witnesses heretofore mentioned with regard to what is shown in the workings upon the Puzzle and the Ouray claims.

ABRAHAM PLAYER, a miner by business and engaged in mining for 25 years, gave evidence tending to prove the same facts and upon

the same points as the witness hereinbefore mentioned with regard to what is shown in the workings of the Puzzle and the Ouray claims.

54 EDWARD D. BRONSON, a miner by business and engaged in mining for 25 years, gave evidence tending to prove the same facts and upon the same points as the witnesses heretofore mentioned with regard to what is shown in the workings of the Puzzle and the Ouray claims.

W. R. CRANDALL, a miner by business, and also an assayer, gave evidence tending to prove the same facts and upon the same points as testified to in the testimony of the witnesses hereinbefore mentioned in regard to what is shown in the workings of the Puzzle and the Ouray claims.

In addition thereto he testified that he had taken a large number of samples from the workings of the Ouray property from the Ouray discovery shaft up to the point where the Ouray vein crosses the Puzzle vein, and in no case had he failed to find evidence of gold and silver, and that with few exceptions the samples taken had an appreciable value, and ran from 1 to 2 ounces in silver up to several hundred dollars' worth of gold and silver; that said samples were taken at regular intervals of every 5 feet, commencing at the Ouray discovery shaft and running through beyond the Puzzle vein; that his assays and analyses of the ore had shown the same continuous ore body both east and west of the Puzzle vein in the Ouray workings, and that the vein upon both sides of the Puzzle had the same general characteristics as to vein filling, mineral, etc.; that he had also made assays of the Puzzle vein, which showed that the Puzzle vein was an entirely different and distinct vein from the Ouray in its vein filling and general characteristics; that there were three assays upon samples taken from the discovery shaft of the Ouray, the least of which ran 1.20 to the ton, and the highest $7.84 to the ton. Witness produced a large number of samples, which he testified were vein material carrying gold and silver, and which he identified as being taken from points every 5 feet along the Ouray workings from the Ouray discovery shaft to the Puzzle vein, and in all cases taken from the Ouray vein distinct between well-defined walls of country rock; witness furthermore testified that his samples were not selected, but taken across the vein in every instance, and are fair samples of the vein matter shown in the vein at the points where the samples were taken, and of the vein between such points.

Cross-examination:

There were no points between the Ouray discovery shaft and the Puzzle vein where there was ore in sufficient quantities shown in the workings to justify a miner in working the same, although the ore at many points was rich enough provided there had been a sufficient quantity of it; that the question of whether a vein would pay

to work or not, had nothing to do with the question of
55 whether it is a true vein; that there was no point in the workings east of the Puzzle vein and up to the Ouray discovery shaft where he failed to find true and genuine vein material, which any miner would recognize and follow with the hope and expectation of getting pay ore; that the vein shown in the Ouray workings ranged in width from 6 or 8 inches to five feet, composed of vein filling, more or less mineralized and in many places carrying free mineral; that he does not know of any ore having been taken from the Ouray workings between the Ouray shaft and the Puzzle vein which had been milled or worked for profit; that the greater part of every vein consists of gangue or vein matter which is worthless, and which is the matter carrying the material; and that the vein is only valuable from a practical standpoint when ore is found in sufficient quanties to enable a miner to work it for profit; that the greater portion of all veins, however, are worthless, and that the miner followed the vein material even though barren of mineral, with the expectation of getting ore sooner or later.

D. W. FALL, a miner and assayer by business, gave testimony tending to prove the same facts and upon the same points, with regard to what is shown in the workings of the Puzzle and Ouray claims, as the other witnesses heretofore named, and he further testified that he had assisted the witness Crandall in taking samples and making assays, and he testified to the same effect and upon the same points as said Crandall, as to what was found in the workings of the Ouray claim, and identified the samples produced by said Crandall.

GEORGE F. JONES, business mining and milling, gave testimony tending to prove and upon the following points: That he had visited and examined the Ouray workings from the Ouray discovery shaft up to the point where it is claimed that the Ouray and Puzzle veins cross each other; that he went there simply for the purpose of taking samples from said workings and testing the same, with a view to determining whether said workings show a true mineral-bearing vein between walls; that he had taken samples at various points every few feet through said workings, not selecting the same, but taking them fairly across the vein; that at no point did he fail to find a well-defined vein of mineral-bearing matter or vein filling between walls; that wherever he took out samples the mineral was properly a concentrating ore, that is to say, ore that should be concentrated in order to make the same pay; that in concentrating the samples that he took out, he followed the regular and usual method followed with regard to concentrating ores, putting from 1 to 10 parts in 1 as is customary in handling ores. Witness produced a large number of his concentrates showing free mineral, and which he identified as having been taken from the workings of the Ouray east of the Puzzle vein; that said samples after being concentrated, gave values ranging from $9.68 a ton of concentrates to nearly
56 $1,400 in concentrates; that about one-half the samples taken

ran below $100 in value in concentrates, and that the other half ran up into the hundreds.

Cross-examination:

All of the samples taken ran from 50 to 100 pounds in weight, each of which was properly treated in the usual method of smelting ore, and samples taken from them, with a view of determining the value; that such method is followed by all millmen and smelters in ascertaining the value of ore; that the final samples taken would be a pound or two and would be fair samples of the entire lot; that he did not know whether there was sufficient ore of the kinds above referred to as having been taken and sampled in the Ouray workings to pay a miner for working the same; that the ore at many points was rich enough, if found in sufficient quantities, to justify working for profit.

And the following additional witnesses, viz., John Henry Cameron, a miner; Malcolm Anderson, a miner; F. T. Freeland, civil and mining engineer; J. Q. Thomas, miner; Alfred Richard, miner; Charles P. Baldwin, miner, and Wm. Byrd Page, civil and mining engineer, gave evidence on behalf of the defendant tending to prove the same facts and upon the same points as are testified to in the evidence of the witness Price and the other witnesses hereinbefore mentioned, with regard to what is shown in the workings of the Ouray and Puzzle claims.

And there being no further oral evidence on behalf of the defendant, he introduced in evidence the location certificate of the Ouray Lode mining claim, which is in words and figures as follows, to wit:

"STATE OF COLORADO, } ss:
County of Summit, }

Know all men by these presents that L. M. Thomas, H. C. Kilen, C. H. Haynor, F. H. Stanton and H. B. Scott, the undersigned, have this 29th day of July, 1885, located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Ouray lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 75 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 150 feet running N. 48° 25′ E. from center of discovery shaft, and 1,350 feet running S. 48° 25′ W. from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge or deposit and within the lines of said claim, in Minnesota mining
57 district, county of Summit and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1, thence S. 41° 35′ E. 150 feet to cor. No. 2; thence S. 48° 25′ W. 750 ft. to side centre stake, and 1,500 ft. to cor. No. 3, whence p'k No. 3 of ten-mile range bears N. 50° 38′ W. and p'k No. 10 bears S. 73° 48′ W.; thence N. 41° 35′ W. 150 ft. to cor. No. 4, whence p'k No. 3 bears N. 50° 49′ W. and p'k No. 10 bears S. 73° 06′ W.; thence N. 48° 25′ E. 750 ft. to side center stake and 1,500 ft. to cor. No. 1, place of beginning. Var. 14° 30′ E.

(Signed) C. B. CRAMER. [SEAL.]
L. M. THOMAS. [SEAL.]
H. C. KILEN. [SEAL.]
C. H. HAYNOR. [SEAL.]
F. H. STANTON. [SEAL.]
H. B. SCOTT. [SEAL.]

Said lode was discovered on the 29th day of July, A. D. 1885.
Attest: L. M. THOMAS.

Date of location, July 29th, A. D. 1885.
Date of certificate, Oct. 26th, A. D. 1885."

Indorsement: "Location certificate on the Ouray mining claim of L. M. Thomas *et al.*, in Minnesota mining district, Summit county, State of Colorado."

STATE OF COLORADO, } ss:
County of Summit, }

I hereby certify that this location certificate was filed for record in my office at 1 o'clock, p. m., October 27th, 1885, and is duly recorded in Book No. 7, at page 486.

GEO. RYAN, *Recorder.*

E. R. HANNAHS, *Deputy.*

Fees, $1.25, p'd.

STATE OF COLORADO, } ss:
County of Summit, }

I, W. F. Foreman, county clerk and *ex officio* recorder of deeds in and for the county aforesaid, do hereby certify that the foregoing is a true, full, correct and complete copy of Ouray location certificate, as the same appears of record in my Office Book 7, page 486.

Witness my hand and official seal this 21st day of November, A. D. 1891.

W. F. FOREMAN,
County Clerk and Recorder.

58 And in addition thereto said defendant offered in evidence the following deeds, conveying title from the original locators of the Ouray Lode claim to the defendant herein:

1. Deed dated December 1st, 1886, from Henry C. Kilen to H. B. Scott, conveying $\frac{1}{8}$ of the Ouray lode.

2. Deed dated Dec. 27th, 1886, from L. M. Thomas to H. B. Scott, conveying $\frac{1}{5}$ of the Ouray lode.
3. " dated March, 3rd, 1887, from C. H. Haynor, H. B. Scott, F. H. Stanton to E. C. Moody and J. W. Williams, conveying a $\frac{1}{2}$ interest.
4. " dated Sept. 1st, 1887, from E. C. Moody and John W. Williams to H. B. Scott, conveying a $\frac{1}{2}$ interest.
5. " dated Oct. 3rd, 1887, from C. H. Haynor and F. H. Stanton to H. B. Scott, conveying $\frac{1}{10}$ each.
6. " dated Oct. 7th, 1887, from H. B. Scott to Thomas D. Price, conveying a $\frac{7}{10}$ interest.
8. " dated Sept. 12th, 1888, from H. B. Scott to Thomas D. Price, conveying a $\frac{1}{10}$ interest.
9. " dated February 18th, 1889, from H. B. Scott to Thomas D. Price, conveying a $\frac{9}{10}$ interest.

And thereupon, the defendant rested his case.

And thereupon, the plaintiffs, to further maintain the issues on their behalf, gave in rebuttal testimony of a number of witnesses, hereinafter referred to in detail, which testimony tended to prove the following facts:

That there was not in the year 1885, or at any other time, a legal or valid discovery and location upon any vein within the surface boundaries of the Ouray Lode mining claim;

That the locators of said claim had never at any time made any discovery of any vein in the discovery shaft of the Ouray claim, and that there was no such vein shown at the present time;

That all the workings of the Ouray claim east of where the same reached and crossed the Puzzle vein, are through country rock and that there is no vein or lode whatsoever shown in the said workings or any portion of the same;

That there was no title whatsoever to the Ouray claim under the alleged discovery and location in the year 1885;

That the samples produced by the witnesses of the defendant were not vein material or filling, but were simply decomposed country rock, such as is usually found in that formation;

59 That there was no appearance of any mineral-bearing rock through any of said workings except at a few points where there were little seams of mineral such as are usually found in the country rock;

That there was only one vein or lode shown in any of the workings on the Puzzle or the Ouray claims, which vein or lode is the Puzzle vein, which extends from the east end of the Puzzle claim through the territory in conflict, as shown on the maps introduced in evidence;

That there was no appearance of any crossing of veins whatsoever in the territory in conflict, and that there was no crossing, there being no two veins to cross each other;

That the work done by the defendant and claimed to be upon the Puzzle to the north of the alleged point of crossing was only where

the vein widened or was upon a seam or feeder, running off from the Puzzle vein;

That the vein or lode claimed to be the Ouray vein, to the west of the alleged point of crossing, was a true and well-defined fissure vein, but was in no sense an extension of any vein or lode running from the Ouray discovery shaft, but was an extension of the Puzzle vein and was continuous of the same;

That there was no difference whatsoever in the vein filling or characteristics of that portion of the Puzzle vein west of the alleged point of crossing, from that portion east of the alleged point of crossing; that the same mineral continued through all portions of said Puzzle vein;

That the plaintiff was entitled to the surface in conflict and to that portion of the vein running within said surface, by reason of a valid and legal location under the laws of the United States, and that the defendant had no title whatsoever, and is not claiming under any discovery or location.

Upon the foregoing points the following witnesses were sworn:

RUFUS SNYDER, a miner, gave testimony to prove and upon the following points:

Is familiar with all the workings in territory in controversy; nothing in anywise resembling a lode or vein is shown in the Ouray discovery shaft; nothing but broken formation and country rock in the same; nothing like a seam or streak of talc; from Ouray discovery shaft down to the incline upraise there is nothing but country rock shown; no appearance of vein whatsoever down to Price drift, at the foot of incline upraise; from foot of incline upraise through the Price drift and along through the main Ouray level no vein whatsoever; nothing appearing like a vein; little streaks
60 of lead in two or three places, which ran across the workings at right angles; no appearance of a vein at all, or anything in the nature of a vein through the main Ouray level up to the Puzzle vein; nothing but quartzite country rock, a little iron-stained in some places; specimens produced by defendant of vein matter, only quartzite, which is country rock decomposed; at point where defendant claims crossing of veins there is no crossing whatsoever; in fact there is only one vein to be seen and that is the Puzzle vein; at point where crossing is claimed, vein is from 8 or 9 feet to 16 feet in width, and the drift claimed by the defendant to be the extension of the Puzzle vein after crossing the Ouray, is only the extreme northern side of the vein; no crossing whatsoever shown in the upper levels; only one vein in the workings, and therefore there can be no crossing; found nothing in the Ouray workings outside of the Puzzle, which they claim to be upon the Ouray vein, but broken-up quartzite country rock; numerous samples produced as having been taken from the Ouray workings, commencing at Ouray discovery shaft out to where the workings run into the Puzzle vein; no appearance of vein matter in any of the samples; nothing but

country rock; samples taken are fair samples of everything shown in said workings; also produced numerous samples taken from the Puzzle vein; all of them vein matters, ore and mineral; no appearance of any vein matter, ore or minerals outside of Puzzle vein; there is no vein of any kind whatsoever in the Ouray workings, except where the same are from the Puzzle; and there is no vein and never had been any in the Ouray discovery shaft.

W. H. WILEY, a civil and mining engineer, gave testimony tending to prove and upon the following points:

Is acquainted with the Puzzle and Ouray workings; formation of ground is bed of shale forming surface rock, then a layer of quartzite 70 feet thick, then a layer of porphyry 30 feet in thickness; Puzzle vein cuts right through the formation and shows one large, continuous vein extending through the ground in controversy, filled with ore for a large portion of its length; vein can be followed not only by metallic contents, but by the walls, plainly defined; the ore in vein is lead in some places, and in some places iron; the lead and iron undergo many chemical changes, caused by combination with other mineral and by action of chemicals in the earth, but same character of ore can be followed continuously throughout the vein; vein is also very regular in its course, which is proof of its continuity; very regular in its average size and character; passing to the Texas tunnel, it runs into the Ouray workings; it first starts in quartzite, then passes through the quartzite, which lies at an angle above the porphyry; tunnel then reaches the porphyry, which lies at an incline; various points found in the Texas tunnel, where there is mineralization, but runs across the Texas tunnel, and not with it; this mineral infiltrated
61 through little seams and penetrated into the rock; very common in rock of that character to find such seams, especially in the neighborhood of large veins. At the northerly end of the Price drift a streak of mineral is found, well defined, but it does not run in the direction of the workings of the Ouray claim, but across them, diverging from them; in the Court drift, near the Price drift, there is also a seam of lead, but it does not run with the Court drift at all, and departs from it; such deposits of mineral frequently found near large veins; the workings of the Ouray beyond this point are in porphyry, which is not solid, and is easily decomposed by water; you can find a large quantity of soft, decomposed material in these workings, and sometimes more or less quartzite; this soft matter, however, is absolutely not vein matter, and is no indication of vein matter; very common to find such in workings; the Ouray discovery shaft is through shale and broken up and decomposed quartzite; numerous samples taken from the shaft and never found therein anything in anywise appearing like a vein or vein matter; made a careful examination of it and took best samples possible; nothing but country rock shown in the Ouray discovery shaft; going from discovery shaft down to the incline upraise found nothing but broken country rock; in some places quartzite, in

others porphyry; made careful examination; took best samples could find at intervals of 10 feet; produced samples; nothing but country rock; assays made, no results; from foot of incline upraise on to the west, sampled whatever was shown in the Ouray workings thoroughly; produced samples; nothing but country rock; made numerous assays; found no mineral except at one point, above referred to, where lead streak was shown; picked out the best specimens possible; also sampled the Puzzle vein; made assays on it; samples produced; fine vein matter; assays show good mineralization and high values; in no sample taken in the Ouray workings outside of the Puzzle vein was any trace of gold or silver found whatsoever; if there had been anything appreciable in value in rocks it would have been found; absolutely failed to find anything in the nature of a vein extending through the Ouray workings east of the point where they cut into the Puzzle vein; nothing is shown but soft matter, broken-up country rock and country rock more or less solid; there are no walls whatsoever, which a vein should properly have; nothing but sides of the drift, showing cleavage planes in the rock; there is absolutely no crossing of veins, as claimed by defendant; there are no two veins to cross; there is only one vein found showing in the workings and that is the Puzzle vein; it continues from the Puzzle discovery shaft entirely through the ground in controversy, as shown on the map; the little drift run to the north, and which is claimed to be the Puzzle vein after the crossing with the Ouray, is nothing more than a widening of the vein, or perhaps a split-off from the vein; the Ouray level east from the point where they claim the crossing is shown is run just on the line of the junction between the porphyry and
62 quartzite formations; these formations have an incline of about 12 degrees from the horizontal; water percolates down through the two formations and along the line thereof, and has decomposed the rocks to some extent; this accounts for the soft clayey stuff that is found in the workings; it is nothing more than decomposed rock with no mineral except at a few places and such as is found in any country rock; as you get close to the Puzzle vein you find more mineralized matter running in streaks off from that vein; the drift run to the north from the alleged point of crossing, is in the Puzzle vein—inside of it; simply a place where the vein is very wide; samples produced of the vein matter at that point; more ore is found in the Texas tunnel running across the same than is shown in the entire Ouray drift; there is absolutely no connection between the little veins in the Texas tunnel and the little vein in the Price drift, running across the Court drift, and on to the west and near to the Puzzle; the Puzzle vein is a large, well-defined and unusually regular one; changes its average width as all veins do; admitting that there are two veins shown, there is not sufficient development work to prove that there is a crossing; more probable that there is a junction; junctions of veins much more common than crossings. Such tests as were testified to by defendant's witnesses, with regard to assays taken from concentrates, are absolutely worthless, unless every point with regard to the concentration

is known; as to the character of the rock, amount of it, process, etc., no argument can be based upon assays taken from concentrates, unless the concentrates were sufficiently accurate with regard to the number of parts put into one part and the process, as to make it apparent that the rock must have value; gold is very commonly found in that section of the country and in that formation, and a very little of it in a large quantity of rock may produce high assays. All the appearance of mineral whatsoever found at any point in the Ouray workings east of the Puzzle vein, can be accounted for by reason of their proximity to the Puzzle vein, and also by reason of the fact that the porphyry and quartzite lie at an incline, and there must necessarily be some mineral found along or near the plane of contact.

To summarize facts as based upon a careful examination: The Puzzle vein is a large, well-defined vein, running from the east end of the Puzzle claim into and through the ground in controversy, as shown by the map; a portion of the workings made by the Ouray people are upon the Puzzle vein; there is no vein whatsoever and no appearance of a vein in the Ouray discovery shaft, and there is no vein whatsoever, or any appearance of a vein, in the Ouray workings, between the discovery shaft and the Puzzle vein; there is no crossing of veins whatsoever.

The following witnesses, to wit: Henry H. Brown, L. M. Thomas, Daniel Roberts, A. M. Presnell, John H. Elston, A.
63 C. D. Laws, A. F. Albee, John S. Young, John R. Wilson, Samuel De Mott, David Beck, Theodore Pankhurst, Frederick C. Schroeder, S. C. Whipple and George Walker, also gave testimony, substantially to the same effect as the testimony above set out as given by the witnesses Rufus Snyder and W. H. Wiley, and tending to prove the same facts stated by the said Snyder and said Wiley.

Plaintiffs then offered in evidence certain portions of the answer of the defendant in this case. By agreement of counsel, said answer was introduced as a whole, with the right on the part of the plaintiff to use or read any portion thereof to the jury, and that the same might be considered in evidence.

And there being no other or further oral evidence on behalf of either the plaintiffs or defendant, each of the parties in said cause offered in evidence the maps, models and other exhibits used upon the trial of said cause, and also, the samples produced by each side; which said maps, models, exhibits and samples were allowed as evidence without objection.

And thereupon the defendant asked the court to instruct the jury as follows, that is to say:

PANKHURST
vs.
PRICE.

The court is asked by the defendant to instruct the jury that what is known as negative testimony, that is, testimony that a witness

gives, that upon examination of grounds or places he failed to find what other witnesses with the same opportunities for examination say they did find in or on such grounds or places, is entitled to less weight than the affirmative evidence or testimony of witnesses who say they did actually find such matter or substance, and this as true in respect to the question of ore or mineral matter, claimed to be found in a vein, as it is in any other case; and if you believe that any or all of the witnesses who gave evidence did actually find mineral matter in the drift or incline in defendant's workings, then they may upon such testimony find as a fact that the mineral was thus found, even though the great preponderance of evidence, so far as number is concerned, is of witnesses who did not find mineral or mineral matter in such places, if the evidence of those witnesses who say they did find mineral in such shaft and incline convinces you that it was found in such places and in such quantities as would, within the definition given you, constitute a lode or vein, you are at liberty to find that there is a vein in such lode or shaft, even though you believe that none of plaintiffs' witnesses saw such mineral, though honestly looking for it.

But the court refused to give said instruction, to which said refusal defendant then and there duly excepted.

64 And thereupon the court, of its own motion, charged and instructed the jury as follows, that is to say:

In the Circuit Court.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

THEODORE PANKHURST *et al.*, Plaintiffs,
vs.
THOMAS D. PRICE, Defendant.

HALLETT, *J.* (orally):

You have heard, gentlemen, the contention of these parties for something more than a week, and you are now prepared to decide this controversy. It is my duty to point out to you the facts which you are to decide, which are few and simple, and indeed it may be doubtful whether there is more than one fact that is to be determined. I am also to explain to you the rules of law applicable to the facts, and upon which your verdict is to rest. By what I shall say about rules of law you are absolutely bound. That is, the law in all *of* cases comes from the court, while the facts are to be decided by the jury. You pass upon questions of evidence; the court decides what the effect of the facts found shall be. The Government of the United States gives to all citizens the right to make claims upon the public domain wherever valuable deposits of mineral can be found, and in that way become the owners of the claims. It is a generous provision, and intended for the advantage of citizens—a

very generous provision, indeed. The time will come when it will be regarded with astonishment as a gift on the part of the Government to any one who may seek to profit by it. The only thing which is required of the locator of a mining claim is that he shall observe certain regulations as to the property which he wishes to get and which are necessary in order that it may be segregated or separated from the general body of public land, and may be recognized as his property.

The first of these provisions, the first in importance, and the first in right, is that the locator of the claim shall find a lode or vein in place, on which he proposes to make his location. The language of the statute of the United States on that subject is: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Now, there are other provisions in the same statute, as to the length of the claim and its width; and there is also a provision which I will read to you:

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced."

65 And with this and some other provisions as to the recording of claims, it is left to the miners of the district, or in the absence of regulation by them, and perhaps as superior to any regulations which they may make, the legislatures of the States provide other regulations supplementary to these, which are declared by Congress. Neither the legislatures of the States nor the miners themselves in the district can make anything which contravenes the statutes of the United States. The law of Congress in these matters, the Government being the owner of these lands, is superior to all others. But there are a good many matters in which the legislature of the State may make regulations, or in the absence of such regulations by the legislature, the miners in the district, or miners' laws, as they are sometimes called, shall control. It is not very material in this instance to consider any of these regulations. They are found in the statutes of the State. The only one which appears to be material to the controversy as made by these parties before you is that which relates to the discovery of the lode or vein within the limits of the claim located. In other words, there is no question as to the sufficiency of the stakes set up by these parties, as to the record made by them of their claims. The question which lies between the parties, to some extent, is as to whether there was a discovery of a lode or vein within one of these locations. Now, when prospectors, as they are often called in miners' phrase, go upon the public domain to make location of claims they often come in conflict with each other: That is to say, the ground which is located or attempted to be located by one, is located wholly or in part by some other, and then a conflict arises between them as to the ownership. In the first instance there is a conflict as to the surface ground; that is to say, as to the right of the one party or the other to take the surface of the claim within his location, and what belongs to it; and that is the case in this instance.

You have heard the testimony, and had it explained to you that

these parties, the one working in one place and the other not very far removed in another, so laid out their claims that they crossed each other, and the question now between them is as to the location of the territory covered by both claims, which is this triangular piece here and common to both claims, and to distinguish to your eye, so that you may know what it is, they have shaded it in yellow. What the plaintiffs have to say to you in this case on their part is, that the vein which they discovered in the eastern end of their location (I will call this the eastern end because it bears some relation to that point of the compass on the map) is a vein which goes throughout the territory and follows this blue line through to this point, where it passes out of the territory in conflict. And on the other hand, the other parties represented here by the defendant (the locators of that claim are not here in person as is the case with the plaintiffs), the other parties say that they discovered the
66 same vein in another locality, a little removed from the other towards the north, perhaps over the hill a little, and it has about the same relation to the gulch, which comes along down in this general direction here, and that they found in this a vein, which comes here where there is a point of intersection or crossing, and that it passes along the line colored blue on this map, and colored differently from that, and that is the vein which they claim.

In some instances where it is alleged the veins cross each other, as it is here, it would be a question whether or not one or the other should have the right to claim the surface ground and the vein below, which crosses or intersects the other, and it would be simply a question of priority of ownership between the parties, or priority of location in respect to the right to take the surface ground. But that, I must explain to you, arises in cases where there are two veins crossing each other, admitted to be such, that is, admitted to have that relation to each other.

The law on this subject is found in section 2336 of the Statutes of the United States:

"Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, for the purpose of the convenient working of the mine."

Now, as to this section of the law the supreme court of this State has decided, and it has also been decided in the same way by this court, that the law is that where two veins cross each other, that the elder has the title; in other words, has the right to the vein throughout the territory of both locations, and the junior vein has the right to the point of intersection, and beyond it; so that there is only the space of intersection which goes to the elder location. So that if it were admitted and conceded to be true by these parties, that these veins come to this point, and there they cross, that one, the Puzzle vein, passes in this direction, out through here somewhere, and that the other comes here and takes up this blue line, and passes along in this direction, then it would be a question whether the one or the other of these locations was the elder; the elder would have the right to the vein throughout its entire

course, and the other the right to the vein throughout its entire course, excepting the space of intersection. In other words, if upon that hypothesis and theory, if it were conceded by parties that the veins were of this character, and crossing each other at the place indicated here, and that the Ouray is the elder of the two, then the Ouray would have the right to take by patent from the Government the ground in controversy between the two claims, and would have the right to the vein, beginning at this point and passing through along in this direction and out there; while the Puzzle would have the same right as to this vein, passing on in this direction, excepting only the space of intersection, leaving
67 the balance to the other parties, the Ouray vein. But such, as you have learned through the testimony that you have heard during the week past, is not the controversy between these parties. It is very different from that. While that is the contention of the defendant in the suit, the Ouray party, that the vein beginning here, comes to this point, and then passes on with the blue line, and that the others have a vein beginning here and passing out in that direction, that is not at all conceded by the plaintiffs in the case. They contend that there is in fact but one vein, beginning here and extending throughout the territory along the space marked on the map. So that the real controversy between the parties is as to the ownership of the vein from this point, which is regarded as the point of crossing, or as the point of intersection of the veins, and this point where it passes beyond the ground in dispute. And upon that the question for you to consider is whether the one or the other of these parties is right in that matter. Counsel for defendant stated to you in his argument that he would be at liberty to maintain before you that these veins cross each other in the manner claimed by all the witnesses which have been presented by the defendant, and if you find that not to be true, but on the other hand find that the veins come together, and there is a union of veins at this point, that he could still maintain that by his elder title he would take the vein throughout its course from this point of union on to where it passes out of the territory in dispute. That is not true, because these positions are not consistent with each other. There are various matters, which I need not now enumerate, in which the law would have to be stated very differently from the statement I shall make, if the case were presented upon that state of facts. The controversy between the parties must be accepted by you exactly as it is presented by the witnesses; that is to say, whether there is a vein here, originating at this point, passing on here and crossing the other at this point, and out in this direction; and another vein beginning at this point, and coming along and passing along here; and upon that you are to say exactly as the matters were presented by the witnesses to you, whether the one or the other of these conditions prevails in respect to this matter.

Now, gentlemen, a general explanation as to the position of these parties having been thus made to you, there is little more to be said as to the matter in controversy. In the first place, as I have read to you from section 2320, location of a mining claim shall not be

made until the discovery of a vein or lode within the limits of the claim located, the party defendant conceding probably that there was a good discovery of ore at some time in the Puzzle location, although he said that it was subsequent in time to his discovery in the Ouray location, claims that he discovered the lode at this point, and that he has followed it continuously to this point, and that it may be recognized as passing on throughout the blue line here, and throughout the ground in controversy; while the position of
67½ the plaintiffs is that no lode whatever is found here, and that there is, in truth, but one lode in all this territory, and so far as the evidence disclosed here, but one lode on that hill.

Now, as to what is the law; it was assumed by counsel in argument that the court would state something to you upon that point; that a definition would be given to you. I do not conceive that where testimony is so strongly conflicting as it is here that a definition can be very important; but, as we have often said, we recognize a body of mineral or mineralized rock in the mass of the mountain continuous in its course, in so far as it is continuous, as a lode; and where there is a crevice, a parting of the country rock, and the space between is filled with mineral matter, something different from the country in general, that with valuable ore occurring here and there, although at considerable intervals in the course of the opening we recognize that also as a lode. In other words, if we find in the mountain a body of valuable ore, and by valuable I mean such as is capable of being worked for value, and being economically worked so as to pay for the work done upon it—in so far as such body of ore can be found in the mountain, we assume that it has boundaries and that it, in itself, without much reference to the character of the boundaries, is a lode. And so, also, when there is a fissure or crevice in the rocks, which by its continuous course and the character of the filling between the rocks, you can recognize in it certain qualities which enable you to distinguish it from the country in which it is found, that also may be a lode, although the valuable deposits in it may be found some distance from each other. It is very difficult to give any definition of a lode or vein which shall be applicable to all cases, because the conditions of veins change so frequently, and they vary so greatly in different localities; but I can say this to you, I think, with reference to the controversy here, that if it be true that the lode here is indeed one which pursues this course out here, and down to the point in controversy, and throughout the ground in controversy, you ought to be able to recognize some of the same qualities in this part of the vein after it passes the point of crossing the other. In general I believe it to be conceded by men who have studied the subject very fully and carefully that lodes crossing each other must be of different origin. If you assume that fissures in the rocks occurred all at the same time, and that the mineral, by whatever agency it comes into the fissures, is of contemporaneous origin, that is to say, that it came along by the same forces at the same time and in all parts subject to the same laws, then we would regard any deposit of min-

eral whatever, with its ramifications through the mountain, as being one and indivisible. Like the branches of a tree, we should be unable to trace the trunk into one branch more than into another. We should say that all is a part of one entire tree. But it is said
68 that if one fissure—a fissure occurring at one time in the mountain, and it becomes mineralized, and afterwards by some force which we do not very well understand, which nobody very well understands, another fissure is made, crossing the first, quite distinct from it, younger in point of time, and different in its course and direction, and that afterwards becomes mineralized, there is then something upon which you can go and say that there are two distinct lodes or veins; two distinct bodies of mineral.

The evidence which was offered for your consideration as to the ore in the vein between these points along here, and the ore in the other vein, differing in quality and character, was intended to impress you with some notion of that matter. It was intended to support the theory that these fissures, if there are such fissures crossing here in this way, were of different origin and not contemporaneous. And so I say to you that if the evidence conveys to your mind the idea that the vein comes from this point here, along through here, and that this is another and distinct one crossing at this point and passing out this way, you ought to be able to distinguish between them in some such way as to say that this and that are not of the same quality, and this also in this direction has the same qualities, and that they are in some way distinguishable from each other. However that may be, all that has been stated to you by the witnesses is to be taken into consideration, and what they say as to the condition of things at the point of crossing.

With this explanation, gentlemen, I think there is not much more to be said about this case upon this point. If you are impressed with the idea, from the testimony, and if upon this testimony you find that the vein beginning here is the same and continuous throughout the territory in dispute, then the case is for the defendant. If, on the other hand, as contended by the plaintiffs, there is no vein whatever in here, and this is really the vein passing from this point down here and out through the territory in dispute, then the case is for the plaintiffs.

Upon these matters I should say to you, probably, that the facts are to be determined by the preponderance of testimony, that is to say, you are to find according to the weight of testimony, and for that side to which your judgment inclines from a consideration of all the testimony which has been offered before you. I wish to say something also of the several trials in this case. It is unfortunately true that in actions of this kind several trials are allowed by law. The defeated party may pay the costs and take a new trial under the statute. It has been permitted in this country in suits of this kind without giving any reason for it whatsoever. That is, he may have one such new trial. And this has made litigation of this kind exceedingly burdensome upon the parties concerned in it. I think it is a most unfortunate provision of the law. But whatever may be said of the wisdom of the law, it is true that in cases of this kind,

69 one trial is not made dependent upon another trial; that is to say, you are entirely to put out of mind the subject of former litigation in the case. Counsel have referred to the testimony of witnesses as given upon former trials, and claim that there are some contradictions in what they have stated this time, when compared with what they stated before; and it is true that witnesses may always be confronted with statements which they have made in the same matter, contradicting what they say upon the stand, as affecting their credibility, whether such statements were made in court or out of court; but such testimony is introduced not for the purpose of giving weight to the former trial. You are to try this case now as if it had never been tried before, in precisely the same way, and to determine the matter as the right seems to you to be.

Gentlemen, if you find for the plaintiff or the defendant you can announce it in a general way in court, and counsel will draw the verdict as they wish to have it.

To the giving of which said instruction the defendant specially objects and excepts, and prays that his exception be duly noted of record. Said exception being to the whole of said instruction and to each and every part thereof.

And afterwards, and on January 15th, 1892, the defendant in said cause filed in said court his motion for a new trial, which said motion was as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court within and for the District of Colorado.

Motion.

THEODORE PANKHURST *et al.*, Plaintiffs, }
vs.
THOMAS D. PRICE, Defendant. }

And now comes the defendant in the above-entitled action, and moves the court to vacate and set aside the verdict of the jury rendered in said cause on the 5th day of December, 1891, and to grant a new trial to the defendant in said cause for the reasons following, to wit:

1st. That the jury in said cause returned a verdict for the entire territory in controversy, as set out by metes and bounds in the complaint in said action, whereas the evidence showed that it was admitted by both parties that the vein claimed by the plaintiffs as the Puzzle vein departed from the side lines of the Puzzle Lode mining claim at a point — feet from the northwesterly end of the territory in controversy, by reason of which said plaintiffs could not legally

claim any of the territory in controversy beyond the line
70 drawn at right angles to the western side lines, at the point where the vein crosses the west Puzzle side line; and the verdict should have been for the defendant for the balance of the t-rritory in controversy.

2nd. That the instructions of the court were of such an indefinite and general nature as to mislead and confuse the jury, and were calculated to prevent the jury from deciding the issues in said cause as presented to them by the evidence.

3rd. That the court erred in that portion of its instructions to the jury which set out the respective claims of the plaintiffs and defendant, and beginning with the words, "and what the plaintiffs have to say to you in this case on their part," etc., and continuing down through the words, "and upon that question for you to consider is whether the one or the other of these parties is right in that matter," for the reasons that said instructions do not clearly and correctly state to the jury the controversy between the parties and their respective claims in this suit; and also, because such instructions do not correctly state the law with regard to crossing veins, as applied to this case, and also because the court instructed the jury, in substance and effect, that the crossing of veins being not admitted, though such a fact was a material issue on the case, the question of priority of discovery and location had nothing to do with this case; and also because the instructions of the court upon the points referred to were calculated to confuse and mislead the jury in determining what were the material issues of the case, and the law as bearing upon such issues; and for other reasons to be set out in argument.

4th. The court erred in that portion of its instructions to the jury in reference to the right of the defendant to a verdict only upon the theory and fact that the veins crossed, and in declaring that the defendant could not rely upon a junction of veins, which said instructions commences with the words, "the counsel for the defendant stated to you in his argument" and running through the words, "whether the one or the other of these conditions prevail in respect to this matter," for the reasons that such instructions entirely preclude the question of priority of discovery and location, and entirely preclude any consideration by the jury of the rights of the defendant based upon a discovery and location prior in point of time to the discovery and location of the Puzzle claim, and the extension of the vein upon which such prior discovery and location was made, into and through the territory in controversy. And furthermore, the court in such instruction, made the question of crossing or non-crossing the main issue in the case, whereas, the same was a subordinate issue, and was not made by the pleadings in said cause at all, but was simply a question of legal fact arising out of the evidence, the pleadings of the defendant having based his right upon prior discovery, appropriation and location, according to law; and for other reasons to be set out in argument.

71 The court erred in its instructions to the jury as to the definition of the word "lode" and in instructing the jury with

regard to what must appear to them from the evidence to justify them in concluding that there was a crossing of veins which said instruction commences with the words, " Now, as to what is the law ; it was assumed by counsel, in argument, that the court would state something to you upon that point," and *and* continuing through the words, " and what they say as to the condition of things at this point of crossing," for the reason that such instructions were unnecessary and indefinite and calculated to confuse and mislead the jury. And furthermore, that such instructions were largely theoretical and did not present to the minds of the jury a clear issue upon the evidence in the case.

And for the further reason that the court failed to instruct the jury as to what is a lode, within the meaning of the statute, in reference to discovery and location ; and for other reasons to be stated in argument.

6th. The court erred in its instructions to the jury in completely ignoring the main and principal issues of the case, viz: As to the right of the respective parties based upon prior discovery and location, and in reducing the case to a single and subordinate issue, of whether there was a crossing of veins or not.

HENRY W. HOBSON,
WILLARD TELLER,
Att'ys for Def't.

And afterwards, and on the 15th day of February, 1892, said motion coming on for hearing, the court then and there overruled and denied the same, and entered judgment for the plaintiffs on the verdict of the jury rendered, as hereinbefore set out, to which said action of the court, in overruling said motion and refusing to set aside the verdict and grant a new trial, and also to the entering of judgment upon said verdict the defendant, by his counsel, then and there duly excepted.

And forasmuch as the foregoing testimony and proceedings do not appear of record in this cause, the defendant therein presents this, his bill of exceptions, and prays that it may be signed and sealed by the judge of said court, and made a part of the record in this cause.

Which is accordingly done.

MOSES HALLET, [SEAL.]
Dist. Judge.

Apr. 2, '92, I believe the within bill is correct.

R. S. MORRISON,
Att'y for Pl'ffs.

Received April 5th, 1892.

ROBERT BAILEY, *Clerk.*

Indorsed: 2473. U. S. circuit court. District of Colorado Theodore Pankhurst *et al. vs.* Thomas D. Price. Bill of exceptions. Filed Apr. 14, 1892. Robert Bailey, clerk, U. S. circuit court.

72 And afterwards and on, to wit, the 14th day of April, A. D. 1892, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, Thos. D. Price, as principal, and Edward F. Bishop & Herman C. Joy, as sureties, are held and firmly bound unto Theodore Pankhurst and Frederick Schroeder in the full and just sum of five thousand dollars, to be paid to the said Theodore Pankhurst and Frederick Schroeder, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the November term, A. D. 1891, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between the said Theodore Pankhurst and Frederick Schroeder, as plaintiffs, and Thos. D. Price, defendant, judgment was rendered against the said Thos. D. Price for the possession of certain real estate in controversy in said action, and the said Thos. D. Price having obtained a writ of error to the United States circuit court of appeals for the eighth circuit, and a citation directed to the said Theodore Pankhurst and Frederick Schroeder, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Thos. D. Price shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force
73 and virtue.

THOMAS D. PRICE. [SEAL.]
EDWARD F. BISHOP. [SEAL.]
HERMAN C. JOY. [SEAL.]

Approved April 14th, 1892.

MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Edward F. Bishop and Herman C. Joy, sureties on the within bond, being each first duly sworn, deposes and saith that he is

worth in real estate the sum below set opposite his name—that is to say, as to Edward F. Bishop, ten thousand dollars; as to Herman C. Joy, five thousand dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

EDWARD F. BISHOP.
HERMAN C. JOY.

Subscribed and sworn to before me, at Denver, this 13th day of April, A. D. 1892.

ROBERT BAILEY, *Clerk*,
[SEAL.] By F. W. TUPPER,
Deputy Clerk.

(Indorsed:) Gen. No., 2473. Circuit court of the United States, district of Colorado. Theodore Pankhurst *et al. vs.* Thomas D. Price. Bond upon writ of error. $5,000.00. Filed this 14th day of April, A. D. 1892. Robert Bailey, clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

74 Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1891, thereof, between Theodore Pankhurst and Frederick C. Schroeder, plaintiffs, and Thomas D. Price, defendant, a manifest error hath happened, to the great damage of the said Thomas D. Price, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit on or before the 13th day of June, 1892, to the end that, the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of April, in the

year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the 116th year.

[SEAL.] Issued at office in Denver, in said district, with the seal of the circuit court of the United States for the district of Colorado, and dated as aforesaid.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by—
MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

75 In obedience to the command of the within writ I herewith transmit to the honorable the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

[SEAL.] In witness whereof I hereto subscribe my name and affix the seal of said circuit court of the United States for the district of Colorado, at Denver, in said district, this sixth day of May, 1892.

ROBERT BAILEY, *Clerk.*

(Indorsed:) No. 2473. United States circuit court of appeals, eighth circuit. Thomas D. Price, plaintiff in error, *vs.* Theodore Pankhurst *et al.*, defendants in error. Writ of error to circuit court U. S., district of Colorado. Filed in United States circuit court, district of Colorado, this 14th day of April, A. D. 1892. Robert Bailey, clerk. H. W. Hobson, attorney for plaintiff in error.

And the said citation and proof of service thereof is next hereto attached, to wit:

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to Theodore Pankhurst and Frederick C. Schroeder, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, in said district, wherein Thomas D. Price is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected

and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit
76 court of the United States for the district of Colorado, this 14th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

MOSES HALLETT,
Judge of Circuit Court.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

On this twenty-fifth day of May, A. D. 1892, personally appeared John S. Mosby, Jr., before me, the subscriber, clerk of the district court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to R. S. Morrison, attorney of record for Theodore Pankhurst and Frederick C. Schroeder, on the 14th day of April, A. D. 1892, at Denver, in said district.

JOHN S. MOSBY, JR.

Sworn to and subscribed before me this 25th day of May, A. D. 1892.

[SEAL.] FRANCIS W. TUPPER, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

(Indorsed:) No. 2473. United States circuit court of appeals, eighth circuit. Thomas D. Price, plaintiff in error, *vs.* Theodore Pankhurst *et al.*, defendants in error. Citation. Filed in United States circuit court for the district of Colorado this 14th day of April, A. D. 1892. Robert Bailey, clerk. H. W. Hobson, attorney for plaintiff in error.

77 And afterwards and on, to wit, the 14th day of April, A. D. 1892, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause, his assignment of errors.

And the said assignment of errors is in words and figures as follows, to wit:

In the Circuit Court of the United States within and for the District of Colorado.

Assignment of Errors.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error.

I.

The court erred in refusing to instruct the jury as requested by defendant, as follows: That

"What is known as negative testimony, that is testimony that a witness gives, that upon examination of grounds or places he failed to find what other witnesses with the same opportunities for examination say they did find in or on such ground or places, is entitled to less weight than the affirmative evidence or testimony of witnesses who say they actually did find such matter or substance, and this as true in respect to the question of ore or mineral matter claimed to be found in a vein as it is in any other case, and if you believe that any or all of the witnesses who gave evidence did actually find mineral matter in the drift or incline in defendant's workings then they may, upon such testimony, find as a fact that the mineral was thus found, even though the great preponderance of evidence, so far as number is concerned, is of witnesses who did not find mineral or mineral matter in such places. If the evidence of those who say they did find mineral in such shaft and incline convinces you that it was found in such places and in such quantities, as would, within the definition given you, constitute a lode or vein, you are at liberty to find that there is a vein in such lode or shaft, even though you believe that none of the plaintiffs' witnesses saw such mineral though honestly looking for it."

II.

The court erred in the whole of its instructions to the jury, in that they were of an indefinite and general nature and calculated to mislead and confuse the jury, and to prevent them from deciding the issues of said cause as presented by the evidence.

78 III.

The court erred in that portion of its construction to the jury which set out the respective claims of the plaintiffs and defendant, and which said instructions were in the words following, to wit:

"What the plaintiffs have to say to you in this case on their part is that the vein which they discovered in the eastern end of their location (I call this the eastern end because it bears some relation to that point of the compass on the map) is a vein which goes

throughout the territory and follows this blue line through to this point, where it passes out of the territory in conflict. And on the other hand, the other parties represented here by the defendant (the locators of that claim are not here in person as is the case with the plaintiffs), the other parties say that they discovered the same vein in another locality, a little removed from the other towards the north, perhaps over the hill a little, and it has about the same relation to the gulch, which comes along down in this general direction here; and that they found in this a vein, which comes along here where there is a point of intersection or crossing; and that it passes along the line colored blue on this map, and colored differently from that, and that is the vein which they claim.

In some instances where it is alleged the veins cross each other as it is here, it would be a question whether or not one or the other should have the right to claim the surface ground and the vein below, which crosses or intersects the other, and it would be simply a question of priority of ownership between the parties or priority of location in respect to the right to take the surface ground. But that, I must explain to you, arises in cases where there are two veins crossing each other, admitted to be such—that is, admitted to have that relation to each other.

The law on this subject is found in section 2336 of the statutes of the United States: 'Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection for the purpose of the convenient working of the mine.' Now, as to this section of the law, the supreme court of this State has decided, and it has also been decided in the same way by this court, that the law is, that where two veins cross each other, that the elder has the title; in other words, has the right to the vein throughout the territory of both locations, and the junior vein has the right to the point of intersection and beyond it, so that there is only the space of intersection which goes to the elder location. So that if it were admitted and conceded to be true by these parties, that these veins come to this point, and there they cross; that one, the Puzzle vein, passes in this direction, out through here somewhere, and that the other comes here and takes up this blue line, and passes along
79 in this direction, then it would be a question whether the one or the other of these locations was the elder. The elder would have the right to the vein throughout its entire course, and the other the right to the vein throughout its entire course, excepting only the space of intersection. In other words, if upon that hypothesis and theory, if it were conceded by the parties that the veins were of this character, and crossing each other at the place indicated here, and that the Ouray is the elder of the two, then the Ouray would have the right to take by patent from the Government the ground in controversy between the two claims, and would have the right to the vein, beginning at this point and passing through along in this direction and out there; while the Puzzle would have the same right as to this vein, passing in this direction,

excepting only the space of intersection, leaving the balance to the other parties, the Ouray vein. But such, as you have learned through the testimony that you have heard during the week past, is not the controversy between these parties. It is very different from that. While that is the contention of the defendant in the suit, the Ouray party, that the vein beginning here comes to this point and then passes on with the blue line, and that the others have a vein beginning here and passing out in that direction, that is not at all conceded by the plaintiffs in the case. They contend that there is in fact but one vein, beginning here and extending throughout the entire territory along the space marked on the map. So that the real controversy between the parties is as to the ownership of the vein from this point, which is regarded as the point of crossing, or as the point of intersection of the veins, and this point where it passes beyond the ground in dispute. And upon that the question for you to consider is whether the one or the other of these parties is right in the matter."

IV.

The court erred in that portion of its instructions to the jury which is as follows, to wit:

"Counsel for defendant stated to you in his argument, that he would be at liberty to maintain before you that these veins cross each other in the manner claimed by all the witnesses which have been presented by the defendant, and if you find that not to be true, but on the other hand find that the veins come together and there is a union of veins at this point, that he could still maintain that by his elder title he would take the vein throughout its course from this point of union on to where it passes out of the territory in dispute. That is not true, because these positions are not consistent with each other. There are various matters which I need not now enumerate, in which the law would have to be stated very differently from the statement I shall make, if the case were presented upon that state of facts. The controversy between the parties must be accepted by you exactly as it is presented by the witnesses; that is to say, whether there is a vein here, originating at this point, passing on here and crossing the other at this point, and out in this direction; and another vein beginning at this point and coming along and passing along here; and upon that you are to say exactly as the matters were presented by the witnesses to you, whether the one or the other of these conditions prevails in respect to this matter."

V.

The court erred in instructing the jury as follows, to wit:

"Now, as to what is the law; it was assumed by counsel in argument that the court would state something to you upon that point; that a definition would be given to you. I do not conceive that where testimony is so strongly conflicting as it is here, that a definition can be very important. But as we have often

said, we recognize a body of mineral, or mineralized rock in the mass of the mountain, continuous in its course in so far as it is continuous, as a lode; and where there is a crevice, a parting of the country rock, and the space between is filled with mineral matter, something different from the country in general, that with valuable ore occurring here and there, although at considerable intervals, we recognize that also as a lode. In other words, if we find in the mountain a body of valuable ore, and by valuable I mean such as is capable of being worked for value, and being economically worked, so as to pay for the work done upon it, in so far as such body of ore can be found in the mountain, we assume that it has boundaries, and that it, in itself, without much reference to the character of the boundaries, is a lode. And so when there is a fissure or crevice in the rocks, which by its continuous course and the character of the filling between the rocks, you can recognize in it certain qualities which enable you to distinguish it from the country in which it is found, that also may be a lode, although the valuable deposits in it may be found some distance from each other. It is very difficult to give any definition of a lode or vein which shall be applicable to all cases, because the conditions of veins change so frequently, and they vary so greatly in different localities; but I can say this to you, I think, with reference to the controversy here, that if it be true that the lode here is indeed one which pursues this course out here, and down to the point in controversy, and throughout the ground in controversy, you ought to be able to recognize some of the same qualities in this part of the vein after it passes the point of crossing the other. In general, I believe it to be conceded by men who have studied the subject very fully and carefully that lodes crossing each other must be of different origin. If you assume that fissures in the rocks occurred all at the same time, and that the mineral by whatever agency it comes into the fissures is of contemporaneous origin; that is to say, that it came along by the same forces, at the same time and in all parts subject to the same laws, then we would
81 regard any deposit of mineral whatever, with its ramifications through the mountain, as being one and indivisible. Like the branches of a tree, we should be unable to trace the trunk into one branch more than into another. We should say that all is a part of the entire tree. But it is said that if one fissure, a fissure occurring at one time in the mountain, and it becomes mineralized, and afterwards by some force which we do not very well understand, which nobody very well understands, another fissure is made, crossing the first, quite distinct from it, younger in point of time and differing in its course and direction, and that afterwards becomes mineralized, there is then something upon which you can go and say that there are two distinct lodes or veins; two distinct bodies of mineral.

The evidence which was offered for your consideration as to the ore in the vein between these points along here, and the ore in the other vein, differing in quality and character was intended to impress you with some notion of that matter. It was intended to support the theory that these fissures, if there are such fissures

crossing here in this way, were of different origin and not contemporaneous. And so I say to you that if the evidence conveys to your mind the idea that the vein comes from this point here, along through here, and that this is another and distinct one crossing at this point and passing out this way, you ought to be able to distinguish between them in some such way as to say that this and that are not of the same quality; and this also, in this direction has the same qualities, and that they are in some way distinguishable from each other. However that may be, all that has been stated to you by the witnesses is to be taken into consideration, and what they say as to the condition of things at the point of crossing."

VI.

The court erred in failing to instruct the jury as to what is a lode, within the meaning of the statute of the United States, in reference to discovery and location.

VII.

The court erred in its instructions to the jury in completely ignoring the main and principal issues of the case, viz.: As to the rights of the respective parties as based upon the question of prior discovery and location, and in reducing the case to the single and subordinate issue of the crossing or non-crossing of veins.

VIII.

The court erred in overruling the motion for a new trial on the part of the defendant, and in entering judgment for the plaintiffs.

IX.

The court erred in entering judgment against the defendant and on behalf of the plaintiffs for the entire territory in contro-
82 versy, as set out by metes and bounds in the complaint in said action, the evidence showing that the vein claimed by the plaintiffs to be the Puzzle vein, departed from the side lines of the Puzzle claim about half way across the territory in dispute, thereby making the end line of the Puzzle claim at that point.

X.

The court erred in refusing to grant a new trial in said cause to the defendant.

HENRY W. HOBSON,
WILLARD TELLER,
Att'ys for Defendant & Pl't'ff in Error.

Indorsed: 2473. U. S. circuit court. Pankhurst *et al. vs.* Price. Assignment of errors. Filed Apr. 19, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the transcript from district court, Summit county, answer and amended answer, two replications, bill of exceptions, bond on writ of error, assignment of errors, judgment, and all orders of court heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Theodore Pankhurst and Frederick C. Schroeder were plaintiffs and Thomas D. Price was defendant, as fully and completely as the same still remain on file or of record in my office, at Denver.

Seal of United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 6th day of May, A. D. 1892.

ROBERT BAILEY, *Clerk.*

Filed Jun- 3, 1892.

JOHN D. JORDAN, *Clerk.*

83 And on the tenth day of June, A. D. 1892, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } October Term, 189–.

The clerk will enter my appearance as counsel for the plaintiff in error.

HENRY W. HOBSON.

Endorsed: U. S. circuit court of appeals, eighth circuit. 189– October term. No. 135. Thomas D. Price, pl'ff in error, *vs.* Theodore Pankhurst *et al.*, def'ts in error. Appearance. Filed Jun- 10, 1892. John D. Jordan, clerk. Henry W. Hobson, counsel for plaintiff in error.

And on the thirtieth day of June, A. D. 1892, an appearance of counsel for defendants in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

THOS. D. PRICE
vs.
THEO. PANKHURST *et al.* } October Term, 1892.

The clerk will enter my appearance as counsel for the defendants in error.

R. S. MORRISON,
Denver, Colorado.

Endorsed: U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 135. Thos. D. Price, pl'ff in error, *vs.* Theodore Pankhurst *et al.* Appearance. Filed June 30, 1892. John D. Jordan, clerk. R. S. Morrison, Denver, Col., counsel for def'ts in error.

84 And on the first day of November, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

TUESDAY, *November 1st*, 1892.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } No. 135.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing, on application of counsel the time for argument was extended one-half hour on each side.

Thereupon argument was commenced by Mr. Henry W. Hobson, counsel in -half of plaintiff in error, and, the hour of adjournment having arrived, further argument is postponed until ten o'clock to-morrow morning.

And on the second day of November, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

WEDNESDAY, *November* 2, 1892.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } No. 135.

In error to the circuit court of the United States for the district of Colorado.

This cause coming on this day to be further heard, argument was continued by Mr. Samuel W. Jones and Mr. R. S. Morrison, counsel for defendants in error, and concluded by Mr. Henry M. 85 Teller in behalf of plaintiff in error.

Thereupon this cause was submitted to the court upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

And on the fourteenth day of November, A. D. 1892, an opinion of said United States circuit court of appeals was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1891.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST and FREDERICK C. SCHROEDER, Defendants in Error. } No. 135. In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Henry W. Hobson, Mr. Henry M. Teller, for plaintiff in error; Mr. R. S. Morrison, Mr. Samuel W. Jones, for defendants in error.

Before Caldwell and Sanborn, circuit judges, and Shiras, district judge.

CALDWELL, *Circuit Judge*, delivered the opinion of the court.

This action was brought to recover the possession of a portion of the "Puzzle" Lode mining claim. There was a verdict and judgment below for the plaintiffs, and the defendant sued out this writ of error. The only assignments of error relied on are based on the charge of the court to the jury. The charge covers five closely printed pages in the record, and deals with the law and facts of the case applicable to the varying claims of the parties. The bill of exceptions, after reciting the whole charge, concludes as follows: "To the giving of which said instruction the defendant specially

objects and excepts, and prays that his exception be duly noted of record. Said exception being to the whole of said instruction and to each and every part thereof." The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that if the entire charge is excepted to in gross, and any portion of it is sound, the exception cannot be sustained. Beaver *v.* Taylor, 93 U. S., 46; Lincoln *v.* Claflin, 7 Wall., 132; Cooper *v.* Schlesinger, 111 U. S., 148; Burton *v.* West Jersey Ferry Co., 114 U. S., 474; Rogers *v.* Marshall, 1 Wall., 647; Moulor *v.* American Life Insurance Co., 111 U. S., 337; Block *v.* Darling, 140 U. S., 238; McClellan *v.* Pyeatt, 4 U. S. App., 319.

Upon the organization of this court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule and adopted as a rule of practice of this
86 court, in the following terms: "The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court." Rule 10.

This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill; he cannot waive the rule so far as it relates to specific exceptions if he desires to do so. The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice. It is the duty of the party excepting to call the attention of the court distinctly to the portions of the charge he excepts to, and this must be done before the cause is finally submitted to the jury to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice, which it has been intimated at the bar, sometimes obtains of taking a general exception to the whole charge with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial, and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice. It serves to correct hasty, inaccurate or misleading expressions in the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes by removing the ground of exception prevents further litigation. It is, of course, the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury, no part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and

opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record and no error saved by the bill of exceptions, the judgment of the circuit court is affirmed.

Filed November 14, 1892.

87 And on the fourteenth day of November, A. D. 1892, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

MONDAY, *November* 14, 1892.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST and FREDERICK C. SCHROEDER, Defendants in Error. } No. 135.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Theodore Pankhurst and Frederick C. Schroeder recover against Thomas D. Price the sum of twenty dollars for their costs herein and have execution therefor.

November 14, 1892.

And on the seventeenth day of November, A. D. 1892, in the record of the proceedings in said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

THURSDAY, *November* 14, 1892.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } No. 135.

88 In error to the circuit court of the United States for the district of Colorado.

In this cause, on motion of Mr. Henry W. Hobson, counsel for

the plaintiff in error, it is ordered that leave be granted to file a petition for a rehearing in this cause on or before December 12, 1892.

And on the ninth day of December, A. D. 1892, a petition for rehearing was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST and FREDERICK C. SCHROEDER, Defendants in Error.

Petition for Rehearing.

Now comes the plaintiff in error in the above-entitled action and respectfully prays for a rehearing and reconsideration of this cause and of the matters and things under which this court affirmed the judgment of the court below, and for the following reasons, to wit:

First—That the sole question upon which this court affirmed the judgment of the court below was the failure of plaintiff in error to except to the charge of the court below otherwise than by general exception.

89 Second—Inasmuch as it was admitted in this case that, notwithstanding the rule of this court and the practice of the circuit court of the United States that the plaintiff in error, according to the practice of the said circuit court of the United States for the district of Colorado, did not have an opportunity given him to examine the charge of the court to the jury and to make special objections thereto; and inasmuch as it is apparent from the charge itself that the jury below were not properly instructed upon the principal, and, in fact, the only essential question before them for their consideration, justice to plaintiff in error and due regard for his rights would require a lenient and favorable application of the rule with regard to special exceptions.

Third—The only correct proposition of law contained in the charge of the court below related to two classes of propositions:

(*a*) Those which are entirely irrelevant and immaterial to the issues which were to be decided by the jury.

(*b*) Those upon issues which are shown by the record to have been uncontroverted, and, consequently, not before the jury for their consideration and decision.

Fourth—The rights of the parties to this controversy turn entirely upon the validity of the respective locations of the Ouray and Puzzle mining claims. With regard to these, however, the record shows:

(*a*) That the plaintiff in error fully admitted the validity of the discovery and location upon the Puzzle vein by the defendants in error.

90 (*b*) The defendants in error fully admitted the performance of all acts necessary to constitute a valid location by the grantors of plaintiff in error, except the fact of the existence of a vein extending from the Ouray discovery shaft to the territory in controversy.

Fifth—Wherefore, the only real and disputed issue before the jury—the only substantial question for them to pass upon—was with regard to the existence of a vein, as set out in the statutes of the United States, in the discovery shaft of the Ouray claim, and extending to the territory in dispute.

Sixth—The rule of this court, upon which the judgment of the lower court is affirmed, should not be held to apply to instructions given and to propositions of law laid down in reference to immaterial or irrelevant issues, or to questions which are not disputed, and, in fact, admitted. Such rule should, upon reason and authority, be held to extend only to disputed issues—those bearing substantially upon the rights of the parties.

Seventh—The circuit court of the United States has declared that when a charge is substantially incorrect as a whole, a general exception will avail.

Anthony *vs.* The L. & M. R. R. Co., 132 U. S., 172 and 173.

It is respectfully submitted that this doctrine refers to instructions upon substantial issues. An instruction must be substantially incorrect when it is incorrect upon the only real question in a case.

Eighth—Bearing in mind the decision above set out, and
91 referring to the decision of this court in this case, the following clauses of the charge of the court below are submitted as negativing the opinion of this court, that the charge contained propositions of law which are undoubtedly sound:

(*a*) The first paragraph of the charge, extending through fol. 115, is entirely devoted to some general observations upon the policy of the Government in regard to mining claims.

(*b*) The second portion of the charge, beginning with fol. 116, down through the paragraph ending, "and this is the case in this instance," is also devoted to some general observations with regard to the location of mining claims, and to a partial statement of the statutory requirements, all of which said observations and statement of statutory requirements were foreign to the issues before the jury in this case, since there was no controversy upon the points discussed by the court, except the single statement with regard to the statutory requirement of the discovery of a vein or lode within the limits of the claim located, and this exception not only cannot be considered a proposition of law, bringing this case within the rule in reference to general exceptions, but must be also taken as a part of the subsequent charge of the court upon what is a vein. Surely no proposition of law in this part of the charge could have been of any assistance to the jury in leading them to decide this case properly.

(*c*) The next portion of the charge, commencing with the words "you have heard the testimony," in the latter part of fol. 117, and

extending through that paragraph, relates entirely to the state-
92 ment of alleged facts, and is, moreover—whether inadvertently or not—an incorrect statement of the positions of the parties.

(*d*) Following immediately, the next portion of the charge, down through the paragraph ending with the first part of fol. 122, is found to contain a legal discussion entirely foreign to the case and having no bearing upon it, and, in addition thereto, a partial statement of the position of the parties, and, moreover, an incorrect proposition of law, in the latter part of the paragraph referred to, in reference to the rights of the plaintiff in error, defendant below, to assume two different positions in his defense.

(*e*) Beginning with the words, "now, gentlemen," and extending down to fol. 126, the charge relates solely to the discussion and definition of "what is a vein" under the statutes of the United States, and it is respectfully submitted that there is not a correct proposition in the entire portion referred to, upon the subject of veins or vein formations, and the instruction given to the jury must have necessarily misled them in the consideration of this case.

(*f*) The balance of the charge is devoted to general observations upon one thing or another, but entirely foreign to the issues before the jury.

Ninth—Referring, again, to the decision of the supreme court above cited, it is submitted that, so far as the issues before the jury are concerned, and upon which the court was called upon to instruct the jury, there can be no distinct propositions of law found in this charge and the same must be considered as a whole and inseparable in its parts.

93 Tenth—There is one ground of error disregarded by this court which has no relation to the charge to the jury, but relates to the right of the court below to give judgment upon the verdict for the entire territory in controversy, whereas, the evidence of the defendants in error showed that the vein in the territory in controversy departed from the side lines of the Puzzle mining claim at a point shown on the maps, and beyond which they could not properly claim.

Mining Company *vs.* Tarbet, 90 U. S., 463.

All of which is respectfully submitted.

PATTISON, EDSALL & HOBSON,
HENRY M. TELLER,
Counsel for Plaintiffs in Error.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

I, Henry W. Hobson, a duly qualified counselor-at-law, and a member of the bar of the United States circuit court of appeals, for the eighth judicial circuit, do hereby certify that, in my opinion, the foregoing petition for rehearing presents proper and legitimate grounds and reasons for the consideration of this court, and said

petition for rehearing is filed in good faith, and not for the purpose of delay.

HENRY W. HOBSON.

Endorsed: Filed Dec. 9, 1892. John D. Jordan, clerk.

94 And on the twentieth day of February, A. D. 1893, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

MONDAY, *February* 20, 1893.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } No. 135.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard upon the petition for a rehearing filed by plaintiff in error, heretofore submitted to this court.

And this court being now advised, it is ordered and adjudged that said petition for a rehearing of this cause be, and the same is hereby, denied.

February 20, 1893.

And on the twenty-first day of February, A. D. 1893, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

TUESDAY, *February* 21*st*, 1892.

THOMAS D. PRICE, Plaintiff in Error,
vs.
THEODORE PANKHURST *et al.*, Defendants in Error. } No. 135.

In error to the circuit court of the United States for the district of Colorado.

95 On motion of Mr. James A. Seddon, in behalf of counsel for plaintiff in error, it is ordered that the mandate in this cause be, and the same is hereby, stayed for the perid of sixty days from this date.

96 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing ninety-six

pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Thomas D. Price, plaintiff in error, *vs.* Theodore Pankhurst *et al.*, defendants in error, No. 135, October term, 1891, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this second day — March, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals,
Eighth Circuit.

1314

Office Supreme Court U. S.
FILED.
MAR 27 1893
JAMES H. McKENNEY,
CLERK.

NO. . . . . OCTOBER TERM, 1892.

IN

The Supreme Court

OF THE

United States.

Ex Parte THOMAS D. PRICE.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVISION AND DETERMINATION THE APPEAL OF THOMAS D. PRICE, PLAINTIFF IN ERROR, AGAINST THEODORE PANKHURST AND FREDERICK C. SCHROEDER, DEFENDANTS IN ERROR.

HENRY M. TELLER,
HENRY W. HOBSON,
HENRY WISE GARNETT,
For Petitioner.

C. J. KELLY, Printer, Denver.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1892.

Ex Parte THOMAS D. PRICE.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE WRIT OF ERROR OF THOMAS D. PRICE, PLAINTIFF IN ERROR, AGAINST THEODORE PANKHURST AND FREDERICK C. SCHROEDER, DEFENDANTS IN ERROR.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Thomas D. Price, would respectfully represent to this Court, that on the 6th day of May, 1889, Theodore Pankhurst and Frederick C. Schroeder filed in the District Court of Summit County, in the State of Colorado, a complaint in ejectment against petitioner for certain surface territory in

conflict between the Puzzle Lode Mining Claim and the Ouray Lode Mining Claim, which said surface in conflict together with the relative locations of the two said mining claims is shown by reference to Exhibit "A," filed with this petition and brief in support thereof. That thereafter and on, to wit, the 9th day of October, 1889, the petitioner, defendant in said suit in ejectment, removed said cause to the Circuit Court of the United States for the District of Colorado, and thereafter, and on the 6th day of October, 1890, petitioner filed in said Circuit Court of the United States an answer to said complaint, in and by which he denied the ownership on the part of the said Pankhurst and Schroeder of the territory in conflict between the two said mining claims, and alleged that the said territory in controversy was a portion of the Ouray Lode Mining Claim, owned by petitioner, and which said Ouray Lode Mining Claim was legally and duly located under and in accordance with the laws of the United States and of the State of Colorado, long prior to the discovery and location of the Puzzle Lode Mining Claim; and petitioner furthermore alleged that his title to the said territory in controversy was superior to that of the said Schroeder and Pankhurst, by virtue of senior discovery and location and by virtue of compliance thereafter with the laws of the United States and of the State of Colorado, with regard to the performance of annual assessment work, etc.

Thereafter and on the 30th day of October, 1890, the said Pankhurst and Schroeder filed a replication in said Circuit Court of the United

States, in and by which they denied the fact that the Ouray Lode Mining Claim had been duly and legally located under and in accordance with the laws of the United States, and denied the superior or senior right of the petitioner to the territory in conflict by virtue of senior discovery and location of said Ouray Lode Mining Claim; and said parties furthermore denied that the locators of the Ouray Lode Mining Claim had discovered a lode or vein within the meaning of the statutes of the United States within the surface boundaries of the Ouray Lode Mining Claim, and the fact that any such vein or lode was shown in the discovery shaft of the said Ouray claim, upon which a location could be made and a mining claim held under the laws of the United States in such case made and provided.

Petitioner furthermore shows to this Court that the only substantial issue in said cause arose upon the questions of the validity of the discovery of the vein claimed to be the Ouray lode or vein, whether the discovery shaft of the Ouray Lode Mining Claim was upon a vein or lode within the meaning of the statutes of the United States, and whether such vein or lode was continuous throughout the territory of the said Ouray Mining Claim.

That thereafter, and on, to wit, the 4th day of November, 1890, said cause came on for trial in the Circuit Court of the United States aforesaid, at which said trial evidence upon the following points was introduced:

First—The plaintiffs Pankhurst and Schroeder introduced evidence in chief, tending to prove that the Puzzle lode or vein was discovered on the 26th

day of September, 1885, and that the location of the Puzzle Lode Mining Claim was duly perfected according to law and a location certificate thereof filed in the proper record office, on the 18th day of December, 1885; after which said proof in chief the said plaintiffs Pankhurst and Schroeder rested their case in chief.

Second—Petitioner, as defendant, introduced testimony, documentary and oral, tending to prove that the Ouray lode or vein was discovered on the 29th day of July, 1885, and that the location of the Ouray Lode Mining Claim was thereafter perfected according to law, and that the location certificate thereof was filed in the proper recorder's office on the 27th day of October, 1885.

That the discovery upon the Ouray lode or vein was made upon a well defined vein of mineral or mineral-bearing rock in place in country rock at the point indicated upon Exhibit "A," herewith.

That no vein or lode whatsoever was shown or disclosed in the discovery shaft of the Puzzle Lode Mining Claim, or any other surface workings thereupon, prior to the 26th day of September, 1885.

That the Ouray lode or vein, as discovered in its discovery shaft, was a continuous and well defined lode or vein of mineral or mineral bearing rock, carrying gold, silver and other minerals, in place, and extending from the Ouray discovery shaft through the territory of the Ouray Lode Mining Claim up to and through the territory in conflict between the Puzzle and the Ouray claims and beyond said territory in conflict.

That at all points in the workings on said vein the same was shown to be a strong, well defined

vein, as defined by the statutes of the United States.

That the Puzzle lode or vein, as discovered in the discovery shaft shown upon Exhibit "A," was a strong, well defined vein, as defined by the statutes of the United States, commencing at the east end of the Puzzle claim and extending through the Puzzle territory up to and through the territory in conflict between the two claims, and that said Puzzle lode or vein crossed the Ouray lode or vein upon its strike.

That the Puzzle lode or vein was a junior discovery to the discovery upon the Ouray lode or vein, and that by virtue of a valid discovery and location upon the Ouray lode or vein prior to the time said Puzzle lode or vein was discovered and located upon, petitioner was the owner, and entitled to the possession of the territory in conflict as shown by Exhibit "A" herewith.

Third—The plaintiffs, Pankhurst and Schroeder, thereupon introduced testimony, in rebuttal, tending to show that there was not in the year 1885, or at any other time, a legal or valid discovery and location upon any vein within the surface boundaries of the Ouray Lode Mining Claim, and especially not in the discovery shaft of the Ouray Lode Mining Claim, and that no such vein or lode was at present shown in said discovery shaft.

That all the workings upon the Ouray Lode Mining Claim from its discovery shaft up to the point where they meet the Puzzle lode or vein, are through country rock, and that there is no vein or lode whatsoever shown in the discovery shaft or in

any of the workings upon the Ouray Lode Mining Claim until the Puzzle lode or vein is reached.

That all the workings upon the Ouray Lode Mining Claim and run by the claimants of the Ouray lode or vein beyond the point where the Puzzle lode or vein is met, as shown upon Exhibit "A," are upon the extension of the Puzzle lode or vein.

That the said Pankhurst and Schroeder were the owners and entitled to the possession of the territory in conflict, as shown by Exhibit "A," by reason of the discovery and location upon the Puzzle lode or vein, and by reason of the fact that there was no valid discovery of and location upon any vein in the discovery shaft of the Ouray Lode Mining Claim.

Petitioner furthermore shows unto the Court in brief, that he as defendant in said suit, having admitted, by proof, the existence of the Puzzle lode or vein and the validity of the location thereupon, in so far as the Puzzle Lode Mining Claim did not conflict with the Ouray Lode Mining Claim, the sole question for determination in said cause was with regard to the existence of a vein or lode called the Ouray lode or vein, and the fact that a valid discovery was made upon the same.

Petitioner, as defendant, admitted everything necessary to establish the validity of the location upon the Puzzle lode or vein, and based his entire right to the territory in conflict upon the seniority of the discovery of the Ouray lode or vein and the seniority of the location thereupon.

The said Pankhurst and Schroeder, on the other hand, by their testimony fully admitted every

point of petitioner's case, and the performance of all acts necessary to constitute a valid location of the Ouray Lode Mining Claim, except the fact of the discovery of any lode or vein in the Ouray discovery shaft, and the existence of any such vein or lode at all as the Ouray lode or vein.

Petitioner furthermore respectfully shows, as is referred to in the instructions of the Court, shown in the record, that he, during the progress of the trial, claimed that if the existence of the Ouray lode or vein were shown, it was immaterial whether the same crossed the Puzzle lode or vein or united with it on its strike; that in either case, under the laws of the United States, petitioner would be entitled to the territory in conflict between the two mining claims, by virtue of his senior discovery and location.

Petitioner furthermore shows that thereafter, the evidence in said case having been finished, the Honorable Judge of the Circuit Court of the United States aforesaid, gave instructions to the jury orally, which said instructions appear in the record, and are attached to brief of counsel in support of this petition.

The said case having been submitted to the jury upon the evidence and instructions aforesaid, and on, to wit, the 5th day of December, 1891, a verdict in favor of the plaintiffs in said suit was returned by the said jury, to the effect that plaintiffs were the owners of and entitled to occupy and possess and receive from the defendant the ground and premises in controversy.

And thereafter the petitioner, as defendant, filed a motion for a new trial, which was thereafter

and on, to wit, the 15th day of February, 1892, overruled, and judgment was entered by the Circuit Circuit of the United States for the District of Colorado, in favor of the plaintiffs and against petitioner, as defendant, for the entire territory in controversy between the Puzzle and the Ouray Lode Mining Claims; to which said judgment exceptions were duly taken and leave obtained to file bill of exceptions, which said bill of exceptions was subsequently duly filed and appears in the transcript of record in this cause.

From the judgment thus entered, petitioner obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and said Court subsequently, and in an opinion appearing in the record and attached to the brief in support hereof, confirmed said judgment, notwithstanding the fact that the same was erroneous and unjust.

Your petitioner files herewith, as required by the rules of this Court, a duly certified transcript of the record of the cause in the United States Circuit Court of Appeals aforesaid, and respectfully shows to your Honorable Court that the judgment of said United States Circuit Court of Appeals is erroneous, and that the questions involved in said cause and the interests at stake are of such gravity and importance as to justify your Honorable Court in ordering a writ of *certiorari* to issue, according to the practice of this Court, for the review and determination of the action of said United States Circuit Court of Appeals; and your petitioner respectfully prays that such writ of

certiorari may issue under the orders of this Honorable Court.

THOMAS D. PRICE.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLORADO, }

This day personally appeared before me, Robert F. Bailey, Clerk of the Circuit Court of the United States for the District of Colorado, Thomas D. Price, petitioner in the foregoing petition, who was defendant in the Circuit Court of the United States for the District of Colorado, in the cause hereinbefore set out, who being first duly sworn, deposes and says:

That he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

[SEAL.] ROBERT F. BAILEY,
Clerk Circuit Court U. S. Colorado.
By CHAS. W. BISHOP,
Deputy Clerk.

BRIEF AND ARGUMENT UPON PETITION FOR CERTIORARI.

It is respectfully submitted that the matter in controversy in this case is of sufficient importance to authorize this Court to issue a writ of *certiorari* for a review of the action of the Circuit Court of Appeals. A very valuable mining property is in controversy and large financial interests are at stake, which are in danger of being lost upon the strict application of a technical rule of practice.

Notwithstanding the fact that it was made apparent to the Circuit Court of Appeals that the instructions of the trial Court were given orally and that on account of the complicated character of the same, it was impracticable to take special exceptions at the time the charge was given, and notwithstanding the fact that the record showed that the charge to the jury, in so far as it was material and relevant to the only issues in the case, was totally erroneous, yet the Circuit Court of Appeals applied the rule with regard to special exceptions with rigid strictness and refused even to consider this case upon its merits, and summarily affirmed the judgment of the Court below.

Especial attention is called to the fact that whilst the Circuit Court of Appeals asserted in a general and broad way, that the charge of the Court below contained "*some correct propositions of law*," yet there is an utter absence of any designation of such correct propositions, and we submit that there were none such—no distinct propositions of law which bore upon the issues before the jury or were material to the case, which were free from objection. With all due respect to the Circuit Court of Appeals, we must urge that it did not carefully and critically consider the charge to the jury *in connection with the record of the case and with a view of determining its bearing upon the evidence.*

In regard to the ruling of the Circuit Court of Appeals, we understand the correct principle to be that, " A general exception will not avail a plaintiff in error where the charge contains distinct propositions, and any one of them is free from objection; the whole charge must be substantially wrong be-

fore such a general exception will avail for any purpose."

Anthony vs. L. & N. R. R. Co., 132 U. S., 172–173.

In the first place, applying the rule to this case, we contend that eliminating the introductory, explanatory and irrelevant remarks of the Court, there is not in the instructions under discussion a single correct proposition of law or fact.

Secondly, disregarding the immaterial and irrelevant matters, the charge stands as an entirety; it is inseparable in its parts; there are no distinct propositions, any one of which can stand apart from the others; there is not a portion or a section of the charge pertinent or material to the issues, which alone could have been relied upon by the jury for their guidance.

Upon such a question as is presented by this application, we conceive that there is only one way of showing that the Circuit Court of Appeals erred in the position it took, and that is by entering somewhat fully into a discussion of the case which was presented for the consideration of that Court, and by demonstrating that the Court erred in assuming that there were any "*correct propositions of law*" in the instructions of the trial Court. A detailed examination of such instructions and of the issues of fact upon which they were to be applied, is very necessary. We accordingly submit,

First—That the charge of the Court, so far as it related to the material issues in the case, was incapable of separation into distinct parts or propositions.

Second—That such charge, as a whole, was incorrect.

Third—That the entire charge was confused, complicated and ambiguous, dealing in commentary, inference, hypothesis, scientific theory and mistaken conception of the evidence, which must have confused the jury and diverted their minds from the simple and direct issues of the case.

Fourth—That the rights of the parties to this controversy turn entirely upon the validity of the respective locations of the Ouray and Puzzle Mining Claims. With regard to this fact the record shows:

(*a*) That the plaintiff in error fully admitted the validity of the discovery and location upon the Puzzle vein by the defendants in error.

(*b*) The defendants in error fully admitted the performance of all acts necessary to constitute a valid location by the grantors of plaintiff in error, except the fact of the existence of a vein in the Ouray discovery shalf and extending thence to the territory in controversy. This is shown by reference to the latter part of paragraph one (fol. 117) of the instructions.

Fifth—That therefore there was only one material or substantial issue in the case, viz.: the question of whether or not a vein or lode, within the meaning of the law, was shown to exist in the Ouray discovery shaft and extended thence to the territory in controversy. This fact is shown, even without reference to the evidence, by the statement of the trial Judge. In the very first part of his charge he said as follows: "*It is my duty to point out to you the facts which you are to decide, which are few and*

simple, and, indeed, it may be doubtful whether there is more than one fact that is to be determined;" and an examination of the whole charge shows that the trial Court did not consider that there was more than one issue of fact in the case. We contend, therefore, that the greater portion of the charge was upon immaterial and irrelevant points.

Sixth—That each and every portion of the charge to the jury upon the material issue in the case was erroneous, and the charge was erroneous as a whole.

Seventh—That if there was a correct statement of law or fact by the trial Judge, it was either upon—

(*a*) Points entirely irrelevant and immaterial to the case; or

(*b*) Upon points shown by the record to have been uncontroverted by the evidence, and, therefore, presenting no issues to the jury.

Eighth—Upon the sole material issue before the jury, viz.: as to the existence or non-existence of the alleged Ouray vein or lode, the trial Judge gave an instruction which was at variance with the law, viz.: That, in defining what was a vein, the Court made the question of the existence of a vein depend upon whether it would pay to work from an economical standpoint; or, in other words, made the test of a vein the question of its paying qualities; and it furthermore submitted to the consideration of the jury abstract and scientific questions upon which they should determine the existence or non-existence of a vein.

Ninth—The rule of this Court upon which the judgment of the lower Court is affirmed should not

be held to apply to instructions given and to propositions of law laid down upon totally immaterial and irrelevant issues, but only to instructions given upon issues bearing substantially upon the rights of the parties. Moreover, the correct propositions which should preclude the plaintiff in error from taking advantage of special exceptions should be legal propositions, and not voluntary, general and unauthoritative discussions of the facts. A jury is not bound by anything that a Judge says as to facts; it *is* bound by his instructions upon the law. The Circuit of Appeals recognized the correctness of this position, for they did not dismiss the writ of error on account of correct propositions of fact, but asserted that there were "correct propositions of law" and gave little heed to what the trial Judge saw fit to say upon the facts of the case. We are willing to stand upon this ground, viz.: that there were no correct propositions of law in the instructions under consideration.

Tenth—Referring to the rule as laid down in the case of Anthony vs. the L. & N. R. R. Co., cited *supra*, the following analysis of the charge to the jury is presented as negativing the assertion of the Circuit Court of Appeals that the charge contained some propositions of law which were undoubtedly sound:

(*a*) The first part of the charge, extending through fol. 115, is entirely devoted to some general observations upon the policy of the government in regard to mining claims.

(*b*) The second portion of the charge, beginning with fol. 116, down through the paragraph ending "and this is the case in this instance," is also devoted to some general observations with re-

gard to the location of mining claims, and to a partial statement of the statutory requirements, all of which said observation and statement of statutory requirements were foreign to the issues before the jury in this case, since there was no controversy upon the points discussed by the Court, except the single statement with regard to the statutory requirement of the discovery of a vein or lode within the limits of the claim located, and this exception not only cannot be considered a proposition of law, bringing this case within the rule in reference to general exceptions, but must be also taken as a part of the subsequent charge of the Court upon *what is a vein.* Surely no proposition of law in this part of the charge could have been of any assistance to the jury in leading them to decide this case properly.

(*c*) The next portion of the charge, commencing with the words "you have heard the testimony," in the latter part of fol. 117, and extending through that paragraph, relates entirely to the statement of alleged facts, and is, moreover, an incorrect statement of the positions of the parties.

(*d*) Following immediately, the next portion of the charge, down through the paragraph ending with the first part of fol. 122, is found to contain a legal discussion entirely foreign to the case and having no bearing upon it, and in addition thereto, a partial statement of the positions of the parties. Moreover, an incorrect proposition of law is contained in the latter part of the paragraph referred to, in reference to the rights of the plaintiff in error, defendant below, to assume two different positions in his defense.

(*e*) Beginning with the words, "Now, gentle-

men," and extending down to fol. 126, the charge relates solely to the discussion and definition of, "what is a vein," under the statutes of the United States, and it is respectfully submitted that there is not a correct proposition in the entire portion referred to, upon the subject of veins or vein formations, and the instruction given to the jury must have necessarily misled them in the consideration of this case.

(*f*) The balance of the charge is devoted to general observations upon one thing or another, but entirely foreign to the issues before the jury.

There is a rule or principle of law which is superior to all questions of policy or convenience, viz., that where it is apparent to an appellate Court that injustice has been done and the rights of litigants have not been submitted with reasonable fairness and correctness to the jury, the appellate Court, of its own motion, can and should take cognizance of the wrong done. We cannot believe that to be a correct decision which stands upon the strict letter of a rule of practice and ignores the fact that a trial Court has given an entirely erroneous instruction to the jury upon the only uncontroverted and material issue in the case.

But, to go further, and admitting for the sake of the argument that all of the charge, as given, was pertinent to the issue before the jury, we contend, as stated above, that "there is not a single distinct proposition of law which is free from objection." With regard to several such propositions, we may freely concede that considered apart and alone and without reference to whether they bore upon the case or not, the objectionable features are

not serious enough to justify a reversal of judgment, provided there were other correct portions of the charge which fairly submitted the case to the jury, or provided, the charge as a whole were correct.

We should, perhaps, ask pardon for going somewhat fully into a discussion of this case, but valuable interests are at stake, and we feel it imcumbent upon us to present our views fully to the Court, even at the risk of being tedious.

With a correct understanding of the issues before the jury and of the evidence, no argument is needed to show that the charge to the jury must be considered as a whole. There being no issues outside of the one with regard to the existence of the alleged Ouray vein, everything said by the trial Judge beyond that question was immaterial, irrelevant and confusing to the jury. A careful reading of the charge will show that a large portion of the same was abstract in its nature and consisted of a discussion of supposed facts.

Moreover, the entire charge and every part thereof, was ambiguous and confusing. It is impossible from the instructions and independently of the evidence which reduced the issues to a single question, to determine whether the jury were to decide the case upon the question of the discovery of the *same vein in different localities* (an issue never made by the evidence), or upon the question of the crossing of two veins, or upon the question of whether there were or not two veins shown to exist, or upon the existence of pay ore in the veins, or whether or not the two veins were formed at the same time by the same forces and in the same manner.

The Court discussed at length the question of cross veins only to tell the jury that such a question had nothing to do with the case. We submit that the discussion of this question at all was erroneous.

Beaver vs. Taylor, 1 Wall., 637, 644.
Chicago vs. Robbins, 2 Black, 418, 429.
U. S. vs. Breitling, 20 How., 254.
Goodwin vs. Simonds, 20 How., 359.
Blackburn vs. Crawford, 3 Wall., 194.

Immediately afterwards, however, it was stated to the jury that the case must stand or fall upon the issue of a crossing of veins, which, as is hereinafter more fully shown, was most confusing.

Again, the Court, in stating to the jury the respective claims of the parties with regard to discovering the *same vein* in different localities, failed to instruct the jury how that issue affected the rights of the parties to the territory in dispute, or what the law was which would control the respective rights of the parties locating claims upon the same vein.

Ayers vs. Watson, 113 U. S., 594.

Again, the Court in one place states the contention of the parties to be *over one and the same vein;* in another place, that the case must be considered as presented by the witnesses, viz.: that there were *two separate and distinct veins which crossed;* it then swung back to the first position, viz.: to the question of the respective rights of the parties to *the* lode—one lode. Having discussed the facts of the case, as they appeared to it, in the most confused way, the Court then proceeded to discuss what it conceived to be the law of the case, in a manner equally erroneous.

Take the instructions in detail, and we find every portion, whether relating to law or facts, objectionable.

Paragraph 1, according to the division of the charge, as printed with this brief, relates to the statutory requirements in reference to mineral locations, although, by the evidence no issue was raised, except with regard to *one* statutory requirement. The Court, however, saw fit to refer to statutory requirements which, as stated by it, had been admittedly complied with in the matter of location, and started out with the premise that the case at issue was one with regard to the rights of the parties to claim and hold the surface of the earth within their respective locations, yet the Court entirely failed to instruct the jury upon the law governing the right to the surface, or with regard to the acts entitling a locator to claim a valid and senior right to the public domain, and more especially, with regard to the facts which preclude a junior locator from claiming territory already appropriated. It left the determination of these facts to the judgment of the jury, which was erroneous.

Ayers vs. Watson, 113 U. S., 594.
Hudson vs. R. R. Co., 53 Mo., 525, 539.
Stratton vs. Ry. Co., 95 Ill., 25, 32, 33.
Kamphorse vs. Gaffner, 73 Ill., 453, 457.

Again: In paragraph 2 of the instructions, the Court showed that it had entirely misconceived the position of the plaintiff in error, and erroneously stated that the Ouray claimants based their case upon the fact that they discovered the *same vein* which had been discovered in the Puzzle dis-

covery shaft, thus leading the jury into an erroneous position at the start.

In the first place, by a fair construction of the language, it is apparent that the Court assumed that the vein discovered by the Puzzle locators was *the same vein as the one in dispute.* This question was the main issue in the case, and the Court had no right, even indirectly, to make the assumption above set out.

In the second place, instead of the plaintiff in error contending that he had discovered the same vein as that discovered by the Puzzle locators—only in another locality—he strenuously asserted that his vein was an entirely different vein from that discovered in the Puzzle discovery shaft.

From the language of the Court, the jury might well conclude that if the plaintiff in error failed to prove that he had discovered in another locality and previously in point of time, the same vein which had been discovered by the Puzzle locators, his case was lost.

These objections to the instructions are especially forcible because immediately before that the Court had told the jury that the controversy at bar was one with regard to the right to surface territory, dependent upon discovery and location.

Insurance Co. vs. Foley, 105 U. S., 350, 353.
Bank vs. Hunt, 11 Wall., 391, 394.
Beaver vs. Taylor, 1 Wall., 637, 647.

In paragraph 3 of the instructions, the Court erred in discussing a proposition of law foreign to the case; also, in its statement of the law of cross-veins; also, as to the relative positions of

the parties in reference to the crossing of veins; also, in regard to the issue before the jury.

In this portion of the charge is found an apt illustration of the danger of an instruction, partly true, partly erroneous. The question of the law of cross-veins, as presented by the Court, had nothing to do with the case, and it was error to discuss the hypothetical question at the risk of confusing the jury.

U. S. vs. Breitling, 20 How., 254, and other authorities cited *supra*.

This action of the Court was calculated to injure the plaintiff in error in two ways. First, it might have produced upon the minds of the jury an impression that plaintiff in error had rested his case in whole or in part upon a statutory right, which the Court discarded. This was manifestly unfair to plaintiff in error.

Frish vs. Newell, 62 Ill., 292.

Second, it probably led the jury to conclude that a question of a crossing between the two veins in dispute was of no importance in the case, whereas, it was of vital importance as a probative and incidental fact in view of the admissions of the plaintiff in error, by his witnesses, of the existence of a Puzzle vein passing through the territory in dispute, and the consequent necessity which arose for the plaintiff in error to show what became of such vein.

No right in this case could possibly arise upon the law of cross-veins, as discussed by the Court, yet the question of the crossing of the two separate veins had a great deal to do with the rights of the parties—not as a basis of right, but as a collat-

eral fact, corroborative of plaintiff in error's claim that there were two veins within the territory in dispute. This distinction is not a metaphysical, but a legal one, and one that the untrained minds of the jury, unaided, would not be able to grasp, for they would not be able to distinguish between the question of the right to the contents of mineral veins which crossed, and the question of the right to surface territory as dependent upon locations made upon two separate veins, which in the course of the proof were shown to cross each other. The Court had no right to bring the law of cross-veins into the case at all, but having done so, it should surely have clearly explained how the question of crossing bore upon this case, and should not have left the jury to flounder in the dark, with a general impression upon their minds that the question of crossing veins had nothing to do with the case.

The Court further erred in that portion of the charge designated as paragraph 4, when it instructed the jury in effect, that only in the event of a crossing of veins being shown, could plaintiff in error be entitled to a verdict, and that plaintiff in error could not claim the right to the surface in dispute upon the theory that the two veins united. This proposition is clearly contrary to law, for there is no doubt of the right of a defendant in an action of ejectment to avail himself of different and inconsistent defenses. This point has been recently considered by the Circuit Court of Appeals for the Eighth Circuit.

Colo. Cent. Cons. M'g Co. vs. Turck, 50 Fed. Rep., 888.

The reason of the case, however, is contrary to the instruction as given. The question in this case was with regard to the right to certain surface territory. This right depended upon the question of prior discovery and location. Veins of mineral, legally and geologically speaking, may unite, and thence continue as one vein, or they may cross, or "drag" for a distance, and separate without crossing. Under all these conditions the law recognizes the superior right of the first discoverer and locator to the surface territory within the boundaries of his claim. The question of the relation of the senior vein to a vein subsequently discovered is incidental and subordinate, and moreover, such relationship is often incapable of accurate determination, without very extensive and expensive development work. Even after very extensive work, witnesses sometimes greatly differ upon the subject of whether veins cross or unite. If the testimony of the plaintiff in error was correct, to the effect that a vein existed in his discovery shaft and extended through the territory in controversy, it was immaterial to his rights whether such vein crossed the Puzzle vein or united with it; and this, even though the witnesses for the plaintiff in error, exercising their best judgment, might have testified to a crossing. If the jury had been satisfied from the evidence of the plaintiff in error (which was strong and full upon that point) that a vein existed in the Ouray discovery shaft and continued up to and through the territory in controversy; and if, furthermore, the jury had not been satisfied that such vein crossed the Puzzle vein, would it have been right for the

jury to have ignored the Ouray vein and found for the defendants in error?

Rev. Stat., Secs. 2320, 2322.

To go a little further: Suppose the witnesses for plaintiff in error had all testified positively to the existence of two veins coming together within the surface in conflict, but had stated that they could not tell, except as a matter of speculation, whether they united or crossed, would that have justified the Court in instructing the jury to find for the Puzzle claimants? The instruction put the plaintiff in error in a false light before the jury, and was calculated to mislead them as to the real issue which the plaintiff in error was required to meet, viz.: the existence or non-existence of the alleged Ouray vein. From every standpoint the instruction was erroneous.

Goodman vs. Simonds, 20 How., 343, 359.
Chicago vs. Robbins, 2 Black, 418, 429.

All that we have contended for in regard to the fact that most of the charge to the jury was purely introductory, explanatory and immaterial, and did not consist of propositions of law, is shown by the very words of the trial Judge, at the beginning of paragraph 5 of the instructions. The Court said: "Now, Gentlemen, a general explanation as to the position of these parties having been thus made to you, there is little more to be said as to the matter in controversy."

Can it be doubted that the Court itself recognized the fact that up to that point it had been dealing in commentary upon the evidence and had been discussing solely what it conceived to be the position of the parties? Such a discussion by the Court

in most of the State Courts would have been error. In the Federal Court it was permissible, but surely cannot be construed to be a statement of legal propositions, any one of which being correct would estop the plaintiff in error from taking advantage of a general exception.

Take the sentence quoted in connection with the first sentence of paragraph 6: "Now, as to what is the law." Can there be any doubt as to the meaning of the Court? Nothing as applicable to to the issue before the jury had been theretofore discussed, but only supposed facts, misconceived ideas of the claims of the parties, and utterly irrelevant propositions. What law was to be discussed? Why, the law of the case, the law that the jury were to take from the Court and apply to the facts. Then, and then only, did the trial Court announce any "propositions of law" applicable to the case, and from that point only is the charge to be properly considered in order to determine whether the Circuit Court of Appeals was right in its view of the instructions.

Before passing from the consideration of paragraph 5, we must refer to a further misstatement of the positions of the parties, similar to that already referred to. The paragraph as read admits of but one construction, viz.: that the dispute was over *one vein*, claimed to have been discovered by both parties at different points; the Court speaks several times of "the vein," etc.

At the hearing of the case in the United States Circuit of Appeals, counsel for defendants in error laid great stress upon the section found in paragraph 1 of the charge, in regard to the statutory require-

ments in reference to the finding of a lode prior to location, and they urge that this was *one correct proposition of law.* If the reading of a section of a statute, without reference to its context and proper connection, is a correct proposition of law, and brings this case within the rule in reference to special exceptions, then, truly, we have no standing here. But the issue before the jury was not as to the wording or existence of a statute; it was upon the meaning of the statute, what a vein is as contemplated by the statute, and the clause of the instruction referred to must be taken in connection with subsequent portions of the instructions, as is clearly shown by the fact that, in paragraph 5, the Court says: "I have read to you from Section 2320 that the location of a mining claim shall not be made," etc., and it immediately proceeded to consider the law of the case.

And here arises the vital error in the instructions, the error that vitiates it as a whole and in every part. The law of the case was the law with regard to what constituted the legal vein. A careful examination of the language of the instruction will show that the jury were told that a vein or lode, within the meaning of the statute, must be such a body of ore or mineralized rock as to make it valuable for working in an economical sense. The whole instruction turns upon the sentence which reads:

> "In other words, if we find in a mountain a body of valuable ore—and by valuable, I mean such as is capable of being worked for value—and, being economically worked, so as to pay for the work done upon it, we assume that it has boundaries and that it * * * is a lode."

It is unnecessary to do more than refer to the leading authorities to show the error of the instruction given in this case.

Iron Silver Mining Co. vs. Cheesman, 116 U. S., 533, 538.

North NoondayCo.vs.Orient Co.,6 Sawyer, 299 (1 Fed. Rep., 522).

Eureka Mining Co. vs. Richmond Co., 4 Sawyer, 302.

Stevens vs. Williams, 1 McCrary (C. C.), 480, 483.

Stevens vs. Gill, 1 Morrison's Mining Reports, 576, 579.

Hyman vs. Wheeler, 29 Fed. Rep., 351, 354.

Jupiter Mining Co. vs. Bodie Co., 11 Fed. Rep., 666, 675.

Morrison's Mining Rights, p. 104, *et seq.*

Admitting, however, for the sake of the argument, that the Court intended to give a definition in accordance with the established law, is it not then manifest, that the language of the Court is so ambiguous, confused and uncertain as to have misled the jury which is an error almost as serious as a totally erroneous instruction.

Rea vs. Missouri, 17 Wall., 542, 543.

Hall vs. Weare, 2 Otto, 728, 731.

Loring vs. Frue, 14 Otto, 223, 227.

We respectfully submit that, whatever view may be taken of the instruction, the jury could hardly have failed to think that a vein or lode, upon which a valid location could be made, must be one of sufficient value to pay for work done upon it. This idea is opposed to all experience and all law.

The instruction was absolutely fatal to the case of plaintiff in error, for his witnesses never claimed that the Ouray vein, extending from the discovery shaft to where it connected with the Puzzle vein, was of sufficient value to pay for working, but only that it was a true fissure vein, sufficiently well defined to follow and to lead a miner to work it with the hope of getting pay ore.

We may be pardoned for again referring to the fact that this case turned entirely upon the question as to whether the locators of the Ouray claim had discovered and located upon a vein or lode within the meaning of the statute. If so, the case of the plaintiff in error was established, for he unquestionably had the senior claim and could hold the territory in controversy against all the world. If, on the other hand, the Ouray vein was not such as is required by law, the jury was obliged to find for the defendants in error. Under the definition given, could they return a verdict different from what they did?

But the Court plunged deeper and deeper into error. It proceeded to enter upon an abstract and scientific consideration of what a vein was and how it was formed. Conceding that the remarks of the Court might have been scientifically correct, yet they served to mislead and confuse the jury and to induce them to think they must consider and pass upon such geological and scientific questions, whereas, in fact, such considerations were totally foreign to the case and the issues.

See—

Beaver vs. Taylor, 1 Wall., 637, 644 and authorities cited *supra*.

Moreover, the instruction of the Court in this behalf was otherwise erroneous. It must be recalled that if the Court had conveyed any intelligible idea to the jury, it was, in effect, that in order for the plaintiff in error to recover, he must have shown that there was a crossing between two veins. It now attempted to instruct the jury upon this point, and its first words were wrong. An examination of the charge, commencing with the words "it is very difficult to give any definition of a lode" (fol. 124), through the words "two distinct bodies of mineral" (in the first part of fol. 125), will show the portion of the charge to which we are now objecting.

It is perhaps out of place to discuss this instruction from a geological standpoint, but we think it can be easily shown that what the Court asserted to be a generally accepted geological proposition is a subject upon which there have been widely different theories, and that to-day there is absolutely nothing known or established with regard to whether crossing veins were formed at different times or at the same time. It is true that the generally accepted theory of to-day is as stated by the Court, but, after all, it is only a theory and scientific deduction, which may be disputed or upset by the next generation of geologists.

Having instructed the jury that the plaintiff in error must show a crossing between two different veins, the Court furthermore thrusts upon him the burden of showing, what no one has ever been able to demonstrate except by scientific deduction, that such veins were of different origin and were formed at different times. In effect, the Court said: "There

must be two different veins, and unless it be shown that these veins were of different origins and formed at different dates, then you must conclude that whatever vein formations were found in the territory of the Ouray and Puzzle claims, belonged to the same vein, and the verdict must be for the defendants in error."

We contend that, without regard to origin, time of formation, junction or union with the Puzzle vein, its richness or poorness, or any other collateral or incidental questions, if the locators of the Ouray claim found in their discovery shaft a true vein or lode, as prescribed by statute, and said lode could be followed continuously through the territory in dispute, the plaintiff in error was entitled to a verdict, and was furthermore entitled to such instructions as would present to the jury clear and simple issues and leave them a ray of light with which the examine the case on behalf of the plaintiff in error.

Paragraph 8 of the instructions is purely immaterial. We do not think it necessary to any longer discuss this question, and we respectfully submit that a writ of *certiorari* should be granted as prayed for.

HENRY M. TELLER,
HENRY W. HOBSON,
Counsel for Petitioner.

HENRY WISE GARNETT,
Of Counsel.

EXHIBIT "B" WITH BRIEF.

Instructions by the Trial Court.

And thereupon the Court, of its own motion, charged and instructed the jury as follows, that is to say:

In the Circuit Court.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO, } ss.

THEODORE PANKHURST *et al.*,
Plaintiffs,

vs.

THOMAS D. PRICE,
Defendant.

HALLETT, J. (Orally):

Paragraph 1.

You have heard, gentlemen, the contention of these parties, for something more than a week, and you are now prepared to decide this controversy. It is my duty to point out to
115 you the facts which you are to decide, which are few and simple, and indeed it may be doubtful whether there is more than one fact that is to be determined. I am also to explain to you the rules of law applicable to the facts, and upon which your verdict is to rest. By what I shall say about rules of law you are absolutely bound. That is, the law in all of the cases comes from the Court, while the facts are to be decided by the jury. You pass upon questions of evidence; the Court decides what the effect of the facts found shall be. The Government of the United States gives to all citizens the right to make claims upon the public domain wherever valuable deposits of mineral can be found, and in that way become the owners of the claims. It is a generous provision and intended for the advantage of citizens—a very generous provision, indeed. The time will come when it will be regarded with astonishment as a gift on the part of the Government to any one who may seek to profit by it. The only thing which is required of the locator of

a mining claim is that he shall observe certain regulations as to the property which he wishes to get and which are necessary in order that it may be segregated or separated from the general body of public land, and may be recognized as his proper-
116 ty. The first of these provisions, the first in importance and the first in right, is that the locator of the claim shall find a lode or vein in place on which he proposes to make his location. The language of the Statute of the United States on that subject is: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Now, there are other provisions in the same statute, as to the length of the claim and its width; and there is also a provision which I will read to you: "The location must be distinctly marked on the ground, so that its boundaries can be readily traced." And with this and some other provisions as to the recording of claims, it is left to the miners of the district, or in the absence of regulation by them, and perhaps as superior to any regulations which they may make, the Legislatures of the State provide other regulations supplementary to these, which are declared by Congress. Neither the Legislatures of the States nor the miners themselves in the district can make anything which contravenes the statutes of the United States. The law of Congress in these matters, the Government being the owner of these lands, is superior to all others. But there are a good many matters in which the Legislature of the State may make regulations, or in the absence of such regulations by the Legislature, the miners in the district, or miners' laws as they are sometimes called, shall control. It is not very material in this instance to consider any of these regulations. They
117 are found in the statutes of the State. The only one which appears to be material to the controversy as made by these parties before you is that which relates to the discovery of the lode or vein within the limits of the claim located. In other words, there is no question as to the sufficiency of the stakes set up by these parties, as to the records made by them of their claims.

The question which lies between the parties to some extent, is as to whether there was a discovery of a lode or vein within one of these locations. Now, when prospectors, as they are often called in miners' phrase, go upon the public domain to

make location of claims they often come in conflict with each other. That is to say, the ground which is located or attempted to be located by one, is located wholly or in part by some other, and then a conflict arises between them as to the ownership. In the first instance there is a conflict as to the surface ground; that is to say, as to the right of the one party or the other to take the surface of the claim within his location, and what belongs to it; and that is the case in this instance.

PARAGRAPH 2.

You have heard the testimony and had it explained to you that these parties, the one working in one place and the other not very far removed in another, so laid out their claims that they crossed each other, and the question now between them is
118 as to the location of the territory covered by both claims, which is this triangular piece here and common to both claims, and to distinguish to your eye, so that you may know what it is, they have shaded it in yellow.

What the plaintiffs have to say to you in this case on their part is, that the vein which they discovered in the eastern end of their location (I will call this the eastern end because it bears some relation to that point of the compass on the map) is a vein which goes throughout the territory and follows this blue line through to this point, where it passes out of the territory in conflict. And, on the other hand, the other parties represented here by the defendant (the locators of that claim are not here in person as is the case with the plaintiffs), the other parties say that they discovered the *same* vein in another locality, a little removed from the other towards the north, perhaps over the hill a little, and it has about the same relation to the gulch, which comes along down in this direction here, and that they found this a vein, which comes here where there is a point of intersection, or crossing, and that it passes along the line colored blue on this map, and colored differently from that, and that is the vein which they claim.

PARAGRAPH 3.

In some instances where it is alleged the veins cross each other, as it is here, it would be a question whether or not one

or the other should have the right to claim the surface
119 ground and the vein below, which crosses or intersects the other, and it would be simply a question of priority of ownership between the parties or priority of location in respect to the right to take the surface ground. But that, I must explain to you, arises in cases where there are two veins crossing each other, admitted to be such; that is, admitted to have that relation to each other. The law on this subject is found in Section 2336 of the Statutes of the United States:

"Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, for the purpose of the convenient working of the mine."

Now, as to this section of the law the Supreme Court of the United States has decided, and it has also been decided in the same way by this Court, that the law is that where two veins cross each other, that the elder has the title; in other words, has the right to the vein throughout the territory of both locations, and the junior vein has the right to the point of intersection and beyond it; so that there is only the space of intersection which goes to the elder location. So that if it were admitted and conceded to be true by these parties, that these veins come to this point and there they cross, that one, the Puzzle vein, passes in this direction, out through here somewhere, and that the
120 other comes here and takes up this blue line, and passes along in this direction, then it would be a question whether the one or the other of these locations was the elder; the elder would have the right to the vein throughout its entire course, and the other, the right to the vein throughout its entire course, excepting the space of intersection. In other words, if upon that hypothesis and theory, if it were conceded by parties that the veins were of this character, and crossing each other at the place indicated here, and that the Ouray is the elder of the two, then the Ouray would have the right to take by patent from the Government the ground in controversy between the two claims, and would have the right to the vein beginning at this point and passing through along in this direction and out here; while the Puzzle would have the same right as to this vein, passing on in this direction, excepting only the space of intersection, leaving the balance to the other parties, the Ouray vein. But

such, as you have learned through the testimony that you have heard during the week past, is not the controversy between these parties. It is very different from that. While that is the contention of the defendant in the suit, the Ouray party, that the vein beginning here, comes to this point and then passes on with the blue line, and that the others have a vein beginning here and passing out in that direction, that is not at all conceded by the plaintiffs in the case. They contend that there is in fact but one vein, beginning here and extending throughout the territory along the space marked on the map. So that the
121 real controversy between the parties is as to the ownership of the vein from this point, which is regarded as the point of crossing, or as the point of intersection of the veins, and this point where it passes beyond the ground in dispute. And upon that the question for you to consider is whether the one or the other of these parties is right in that matter.

PARAGRAPH 4.

Counsel for defendant stated to you in his argument, that he would be at liberty to maintain before you that these veins cross each other in the manner claimed by all the witnesses which have been presented by the defendant, and if you find that not to be true, but, on the other hand, find that the veins come together and there is a union of veins at this point, that he could still maintain that by his elder title he would take the vein throughout its course from this point of union on to where it passes out of the territory in dispute. That is not true, because these positions are not consistent with each other. There are various matters, which I need not now enumerate, in which the law would have to be stated very differently from the statement I shall make, if the case were presented upon that state of facts. The controversy between the parties must be accepted by you exactly as it is presented by the witnesses; that is to say,
122 whether there is a vein here, originating at this point, passing on here and crossing the other at this point, and out in this direction; and another vein beginning at this point, and coming along and passing along here; and upon that you are to say exactly as the matters were presented by the witnesses to you, whether the one or the other of these conditions prevails in respect to this matter.

PARAGRAPH 5

95 Now, gentlemen, a general explanation as to the position of these parties having been thus made to you, there is little more to be said as to the matter in controversy. In the first place, as I have read to you from Section 2320, location of a mining claim shall not be made until the discovery of a vein or lode within the limits of the claim located, the party defendant conceding, probably, that there was a good discovery of ore at some time in the Puzzle location, although he said that it was subsequent in time to his discovery in the Ouray location, claims that he discovered the lode at this point, and that he has followed it continuously to this point, and that it may be recognized as passing on throughout the blue line here, and throughout the ground in controversy; while the position of the plaintiffs is that no lode whatever is found here, and that there is, in truth, but one lode in all this territory, and, so far as the evidence disclosed here, but one lode on that hill.

PARAGRAPH 6.

123 No, as to what is the law; it was assumed by counsel in argument that the Court would state something to you upon that point; that a definition would be given to you. I do not conceive that where testimony is so strongly conflicting as it is here that a definition can be very imporant; but, as we have often said, we recognize a body of mineral or mineralized rock in the mass of the mountain continuous in its course, in so far as it is continuous, as a lode; and where there is a crevice, a parting of the country rock, and the space between is filled with mineral matter, something different from the country in general, that, with valuable ore occurring here and there, although at considerable intervals in the course of the opening we recognize that also as a lode. In other words, if we find in the mountain a body of valuable ore–and by valuable I mean such as is capable of being worked for value and being economically worked so as to pay for the work done upon it,—in so far as such body of ore can be found in the mountain, we assume that it has boundaries and that it, in itself, without much reference to the character of the boundaries, is a lode. And so, also, when there is a fissure or crevice in the rocks, which by its continuous course and the

character of the filling between the rocks, you can recognize in it certain qualities which enable you to distinguish it from the country in which it is found, that also may be a lode, although the valuable deposits in it may be found some distance from each other.

PARAGRAPH 7.

It is very difficult to give any definition of a lode or vein
124 which shall be applicable in all cases, because the conditions of veins change so frequently, and they vary so greatly in different localities; but I can say this to you, I think, with reference to the controversy here, that if it be true that the lode here is indeed one which pursues this course out here, and down to the point in controversy, and through the ground in controversy, you ought to be able to recognize some of the same qualities in this part of the vein after it passes the point of crossing the other. In general, I believe it to be conceded by men who have studied the subject very fully and carefully that lodes crossing each other must be of different origin. If you assume that fissures in the rocks occurred all at the same time, and that the mineral by whatever agency it comes into the fissures, is of contemporaneous origin, that is to say, that it came along by the same forces at the same time and in all parts subject to the same laws, then we would regard any deposit of mineral whatever, with its ramifications through the mountain, as being one and indivisible. Like the branches of a tree, we should be unable to trace the trunk into one branch more than another. We should say that all is a part of one entire tree. But it is said that if one fissure—a fissure occurring at one time in the mountain, and it becomes mineralized, and afterwards, by some force
which we do not very well understand, which nobody
125 very well understands, another fissure is made, crossing the first, quite distinct from it, younger in point of time, and different in its course and direction, and that afterwards becomes mineralized, there is then something upon which you can go and say there are two distinct lodes or veins—two distinct bodies of mineral.

The evidence which was offered for your consideration as to the ore in the vein between these two points along here, and the ore in the other vein, differing in quality and character, was

intended to impress you with some notion of that matter. It was intended to support the theory that these fissures, if there are such fissures crossing here in this way, were of different origin and not contemporaneous. And so I say to you, that if the evidence conveys to your mind the idea that the vein comes from this point here, along through here, and that this is another and distinct one crossing at this point and passing out this way, you ought to be able to distinguish between them in some such way as to say that this and that are not of the same quality, and this also in this direction has the same qualities, and that they are in some way distinguishable from each other. However that may be, all that has been stated to you by the witnesses is to be taken into consideration, and what they say as to the condition of things at the point of crossing.

PARAGRAPH 8.

With this explanation, gentlemen, I think there is not much more to be said about this case upon this point. If you
126 are impressed with the idea, from the testimony, and if upon this testimony you find that the vein beginning here is the same and continues throughout the territory in dispute, then the case is for the defendant. If, on the other hand, as contended by the plaintiffs, there is no vein whatever in here, and this is really the vein passing from this point down here and out through the territory in dispute, then the case is for the plaintiffs.

Upon these matters I should say to you, probably, that the facts are to be determined by the preponderance of testimony, that is to say, you are to find according to the weight of testimony, and for that side to which your judgment inclines from a consideration of all the testimony which has been offered before you. I wish to say something also of the several trials in this case. It is unfortunately true that in actions of this kind several trials are allowed by law. The defeated party may pay the costs and take a new trial under the statute. It has been permitted in this country in suits of this kind without giving any reason for it whatsoever. That is, he may have one such new trial. And this has made litigation of this kind exceedingly burdensome upon the parties concerned in it. I think it a most unfortunate

provision of the law. But whatever may be said of the wisdom
127 of the law, it is true that in cases of this kind, one trial is not made dependent upon another trial; that is to say, you are entirely to put out of mind the subject of former litigation in the case. Counsel have referred to the testimony of witnesses as given upon former trials, and claim that there are some contradictions in what they have stated this time, when compared with what they stated before; and it is true that witnesses may always be confronted with statements which they have made in the same matter, contradicting what they say upon the stand, as affecting their credibility, whether such statements were made in Court or out of Court; but such testimony is introduced not for the purpose of giving weight to the former trial. You are to try this case now as if it had never been tried before, in precisely the same way, and to determine the matter as the right seems to you to be.

Gentlemen, if you find for the plaintiff or the defendant you can announce it in a general way in Court, and counsel will draw the verdict as they wish to have it."

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

OCTOBER TERM, A. D., 1891.

THOMAS D. PRICE, *Plaintiff in Error,* vs. THEODORE PANKHURST AND FREDERICK C. SCHROEDER, *Defendants in Error.*	*No. 135.* *In Error to the Circuit Court of the United States for the District of Colorado.*

Caldwell, Circuit Judge, delivered the opinion of the Court.

This action was brought to recover the possession of a portion of the "Puzzle" Lode Mining Claim. There was a verdict and judgment below for the plaintiffs, and the defendant sued out this writ of error. The only assignments of error relied on are based on the charge of the Court to the jury. The charge covers five closely printed pages in the record, and deals with the law and facts of the case applicable to the varying claims of the parties. The bill of exceptions, after reciting the whole charge, concludes as follows: "To the giving of which said instruction the defendant specially objects and excepts, and prays that his exception be duly noted of record. Said exception being to the whole of said instruction and every part thereof." The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that if the entire charge is excepted to in gross and any portion of it is sound, the exception cannot be sustained.

Beaver vs. Taylor, 93 U. S., 46.
Lincoln vs. Claflin, 7 Wall., 132.
Cooper vs. Schlesinger, 111 U. S., 148.
Burton vs. West Jersey Ferry Co., 114 U. S., 474.

Rogers vs. Marshal, 1 Wall , 647.
Moulor vs. American Life Insurance Co., 111 U. S., 337.
Block vs. Darling, 140 U. S., 238.
McClellan vs. Pyeatt, 4 U. S. App., 319.

Upon the organization of this Court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule and adopted as a rule of practice of this Court, in the following terms: "The Judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the Court at large to the jury, in trials at common law, upon any general exceptions to the whole of such charge, but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the Court." Rule 10. This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the Judge may be willing to consent to such a bill; he cannot waive the rule so far as it relates to specific exceptions, if he desires so to do. The rule is not made for the Judge's personal protection or benefit, but for the protection of suitors and the advancement of justice. It is the duty of the party excepting to call the attention of the Court distinctly to the portions of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the Court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice, which, it has been intimated at the bar, sometimes obtains, of taking general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial, and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower Court. Its enforcement is essential to the proper and intelligent administration of justice. It serves to correct hasty, inaccurate or misleading expressions in

the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation. It is, of course, the duty of the Court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury,—no part of the trial should be conducted more deliberately and carefully,—and no Court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record, and no error saved by the bill of exceptions, the judgment of the Circuit Court is affirmed.

Filed November 14, 1892.

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IN THE SUPREME COURT.

In re THOMAS D. PRICE.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT: TO CERTIFY TO THE SUPREME COURT THE PROCEEDINGS IN ERROR IN THE CASE OF PRICE V. PANKHURST *et al.*

BRIEF OF COUNSEL IN OPPOSITION TO THE GRANTING OF THE WRIT.

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United States of America, SS.

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This was a mining ejectment tried in the Circuit Court of the United States, District of Colorado, resulting in judgment for the plaintiffs, the defendants in error.

The case was taken by writ of error to the Circuit Court of Appeals, sitting at St. Paul, and there argued and affirmed.

The only question passed upon was the sufficiency of the exceptions to justify consideration of the case on its merits. It was a point of mere practice. It involved no federal question. That such case is not of the class in which this Court will grant a writ of certiorari is our contention.

The matter has been before this Honorable Court in two reported cases within our reach. In *Lau Ow Bew v. U S.*, 144 U. S., 47, where an international question was involved, the writ was allowed.

In the *Woods case* 143 U. S., 202, the questions were upon a point of practice and an ordinary question on the law of Master and Servant in a negligence case. The Court denied the writ.

The gist of these two cases and their clear and satisfactory *concensus* is that this special writ will be allowed only where questions of gravity and importance are involved; that to allow it in all instances of alleged error would defeat the obvious purpose of the Act creating this new Intermediate Court, to wit: The relieving this Court of such a mass of cases as impeded the course of justice and delayed suitors.

It may be admitted that all cases involving in amount enough to give any Federal Court jurisdiction are in a certain sense important—that is, important to the parties and to their counsel—but it is only when some constitutional, or international point is involved or where the matters are of general interest and grave in result, commanding the observation of the country or the concentrated attention of the Federal bar, that this Court will say a cause is important in that it is thus exceptional, and command the issue of its special mandate bringing up the record for its review.

The point involved in the Minnesota case (*In re Woods*) was fully as important as the point of practice involved in this case and the application of the Minnesota case as a precedent is self-evident.

If such a point as that here involved is sufficient to command a special order for the extraordinary writ of *certiorari*, then there is no case upon which an attorney may not hopefully apply for this review. And the benefit accruing to this Court in particular, to the bar at large, and the suitors themselves, by relieving the docket and making all ordinary cases a finality according to the decree which the Circuit Court of Appeals may give, would be practically defeated.

R. S. MORRISON,
Attorney for Defendants in Error.